80-720

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ASSURE COMPETITIVE TRANSPORTATION, INC.,

Petitioner,

VS.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

(1) Is the Interstate Commerce Commission lawfully constituted when two Presidents of the United States (Ford and Carter) have failed to appoint Commissioners to the agency for well over five years, and have thereby allowed the membership to drop from the legally required eleven to six?

(2) Does the President have the discretion to reduce the size of an independent Federal agency to any particular level by his failure to make appointments?

(3) Can a minority of five or less members of the eleven-member Interstate Commerce Commission issue final adjudicatory orders?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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ASSURE COMPETITIVE TRANSPORTATION, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Assure Competitive Transportation, Inc. (ACT) petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit refusing to declare that the rights of petitioner have been violated.

OPINIONS BELOW

The opinion of the Court of Appeals, which is not yet reported, is captioned *Assure Competitive Transportation, Inc. et al.* v. *Interstate Commerce Commission and United States of America,* Nos. 79-1867, 79-2133, 7th Cir., August 7, 1980 (Appendix A-1-A-27). In No. 2133, the Seventh Circuit reviewed a Memorandum Order (Appendix B-1-B-3) of the District Court for the Northern District of Illinois, Eastern Division, granting the Commission's motion to dismiss for want of subject matter jurisdiction.

In No. 79-1867, the Seventh Circuit reviewed two opinions of the Commission (Appendix C-1-C-15 and Appendix D-1-D-8) which are reported at 130 M.C.C. 243 (1978) and 131 M.C.C. 593 (1979). Also under review were two unreported decisions of the Commission, which are reproduced at Appendix E-1-E-2 and Appendix F-1-F-4.

JURISDICTION

The opinion of the Court of Appeals was issued on August 7, 1980 (Appendix A, at A-2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction is also conferred pursuant to § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 702-706.

In No. 79-2133, jurisdiction of the District Court was invoked under 28 U.S.C. § 1337 because an Act of Congress regulating commerce was involved, namely the Interstate Commerce Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. I, § 1, provides:

> All legislative powers herein granted shall be vested in a Congress of the United States, ...

U.S. Const., Art. I, § 8, Cl. 3, provides:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .

U.S. Const., Art. II, § 2, Cl. 2, dealing with the powers of the President, provides:

> He *shall . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States,* whose Appointments are not otherwise provided for, and which shall be established by Law; (Emphasis added.)

U.S. Const., Art. II, § 3, Cl. 4, dealing with the responsibilities of the President, provides:

> [H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. Const., Art. VI, Cl. 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . . .

§ 10301 of the Interstate Commerce Act, 49 U.S.C. § 10301 which governs the composition of the Commission, provides in pertinent part:

> (a) The Interstate Commerce Commission is an *independent establishment* of the United States Government.

(b) *The Commission is composed of 11 members appointed by the President, by and with the advice and consent of the Senate.* The President shall designate one of the members as Chairman. Not more than 6 members may be appointed from the same political party.

* * *

(e) *A vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all of the powers of the Commission.* The Commission may designate a member to act as Chairman during any period in which there is no Chairman designated by the President. (Emphasis added.)

§ 10306 of the Interstate Commerce Act, 49 U.S.C. § 10306, which governs the conduct of proceedings of the Commission, provides in pertinent part:

(a) *A majority of the Interstate Commerce Commission,* a division, or an employee board *is a quorum for the transaction of business.* (Emphasis added.)

STATEMENT OF THE CASE

1. In February, 1979, ACT brought an original action in the United States District Court in Chicago, Illinois against the Commission and its six remaining members. ACT is an Illinois non-profit corporation organized in November, 1978. It has over 7,000 members nationwide, including shippers, motor carriers, financial institutions, insurance companies, drivers, owner-operators, motor carrier lawyers, and transportation practitioners. Its members derive all or a substantial part of their income from the motor carrier industry, or depend on the industry to provide services essential to their livelihood.

2. ACT's complaint is reproduced at Appendix G-1-G-7. ACT sought a declaratory order of its rights and injunctive relief. ACT alleged that because of a number of vacancies on the Commission, stemming from as early as January, 1976, the agency was illegally constituted as lacking the statutorily required eleven members (Appendix G-6).

ACT prayed that the court declare that since June 30, 1978, the actions of the Commission have been conducted unlawfully for lack of a duly constituted majority and for lack of a quorum. (*Ibid.*) ACT also asserted that the Commission, by continuing to transact business, was denying ACT due process of law under the Fifth Amendment to the Constitution. (*Ibid.*)

3. The Commission's response was a motion to dismiss. This was on the grounds that (1) judicial review of Commission rules, regulations, and orders is exclusively in the Court of Appeals, (2) ACT lacked standing because this dispute is merely a generalized grievance and (3) the complaint fails to state a claim upon which relief can be granted because the present Commission is lawfully constituted.

4. The District Court granted the Commission's motion to dismiss for want of subject matter jurisdiction, explaining:

> The proper vehicle for challenging the legality of the Commission's actions is in an appropriate proceeding brought for judicial review of the Commission's rules, regulations and orders in the Court of Appeals pursuant to 28 U.S.C. § 2331. That section prescribes that the Courts of Appeals shall have exclusive jurisdiction to review Commission action. And plaintiff has now raised its allegation of the illegal composition of the Commission in Liberty Trucking Company, No. MC-72997, pending before the Commission. In due course plaintiff will be able to present its arguments to a Court of Appeals in the statutory proceeding (Appendix B-2).

5. ACT appealed this summary dismissal, and by order dated October 29, 1979, the Court of Appeals granted a stipulation by the parties consolidating this appeal (No. 79-2133) with an earlier appeal filed by ACT (No. 79-1867) concerning a motor carrier application of Liberty Trucking Company.

6. Liberty's application had been granted by the entire Commission on reconsideration by an order entered on September 12, 1978. At the time of this decision, there were five vacancies on the eleven-member agency, with Commissioner Brown, whose term had expired on December 31, 1977, "holding over" until her successor was appointed. Six Commissioners participated in this decision, with one Commissioner dissenting and one Commissioner not participating (Appendix C-10).

In the course of its decision, the Commission dealt with the proper balancing of competing interests in determining a motor carrier application (Appendix C-5-C-6).

7. ACT sought intervention, reconsideration and a stay of the Commission's decision. By a decision entered May 31, 1979, the entire Commission allowed ACT to intervene but denied the other relief sought. At the time of this decision, there were six vacancies on the eleven-member agency, with Commissioner Brown continuing to "hold over." Five Commissioners participated in this decision, with one Commissioner dissenting (Appendix D-8).

8. By a petition filed June 20, 1979, ACT sought to vacate the Commission's May 31, 1979 decision. ACT alleged that the Commission did not have jurisdiction to enter the decision. ACT asserted that vacancies in the agency existed "because of the refusal of President Carter, with the co-operation of Chairman O'Neal, to appoint Commissioners." ACT further asserted that because only five of eleven Commissioners decided its earlier pleading, no quorum existed.

By a decision entered July 3, 1979, the entire Commission denied the petition to vacate. Four Commissioners participated in this decision, including Commissioner Brown, whose term had expired over eighteen months previously. Two Commissioners did not participate in this decision (Appendix E-2).

The Commission, in so ruling, relied on a provision of its enabling statute that provides "A vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all of the powers of the Commission."

9. By petition filed June 21, 1979, ACT also sought a stay of the Commission's decision of May 31, 1979 "insofar as the Commission purports to take action with less than a full complement of eleven Commissioners herein." By a

decision entered on July 3, 1979, the Commission, by Chairman O'Neal, denied ACT's request for a stay (Appendix F-1).

ACT accordingly filed a petition for judicial review with the United States Court of Appeals for the Seventh Circuit, No. 79-1867, which was consolidated with No. 79-2133, as noted.

10. On appeal, the Seventh Circuit first affirmed the District Court's dismissal for want of subject matter jurisdiction of ACT's complaint, relying on 28 U.S.C. § 2321(a) as providing the exclusive method of challenging Commission orders (Appendix A-6-A-10). Secondly, the Commission's interpretation of the quorum provision was upheld (Appendix A-10-A-15). Finally, ACT's constitutional challenge to the authority of the agency to continue to function was rebuffed on the theory that the remaining Commissioners were appointed pursuant to law and the Constitution (Appendix A-15-A-18). The Seventh Circuit reasoned that whether the President had deliberately failed to exercise a non-discretionary duty to appoint a full complement of eleven Commissioners was not before the court because President Carter was not a party to ACT's lawsuit (Appendix A-3).

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit Misconstrued The Proper Rule Of The Federal Judiciary In Upholding The Constitution

In our political system, we have three powers of government—legislative, executive, and judicial—each exercised by a separate branch. The framers of the Constitution were imbued with that philosophy of government.

Their work product was not regarded as final, for the framers provided a method of improving it, where necessary, by the simple process of amendment. On twenty-six different occasions, the people have amended the Constitution in the manner provided. But no amendment has ever been proposed which would interfere with the three-fold division of the powers of government or with the separate functions of these branches. Few attempts have also been made by one branch of government to encroach upon or to coerce one of the other two branches.

However, the Executive has recently made just such an attempt, and will be entirely successful, without the intervention of the Supreme Court.

President Carter became Chief Executive in January, 1977 and has yet to fill the ever-present multiple vacancies on the Interstate Commerce Commission. The present membership (November, 1980) of the Commission stands at six—*five* members short of the statutorily required eleven members.[1]

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1. To the extent that this may be unclear from the record below, the Supreme Court is asked to take judicial

The Commission has been without its required complement of eleven members for over *five* years, since the resignation of Commissioner Kenneth H. Tuggle on July 31, 1975 (ANNUAL REPORT, 1977, p. 3). As of that date, the membership of the agency fell below eleven, to which it has never returned.

The President's inaction cannot be further sanctioned by the Supreme Court. This conclusion is dictated by several constitutional factors: the status of the Interstate Commerce Act as a supreme law of the land, together with the obligation of the President to faithfully execute the law; the implications to be derived from the constitutionally delineated role of Congress in regulating interstate commerce; and the fundamental doctrine of separation of powers.

Article VI of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land . . . .

U.S. Const., Art. VI, Cl. 2. What is now known as the Interstate Commerce Act was originally enacted as the Act to Regulate Commerce, approved February 4, 1887 (24 Stat. 379). Petitioner submits that it is now far too late to assert that the Interstate Commerce Act fails to have the status of the supreme law of the land under Article VI.

Article II, § 3 of the Constitution requires that the President "shall take care that the Laws be faithfully executed." This constitutional responsibility clearly extends to all laws of the land, including, in this instance, the

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notice of the personnel of the Commission. Frischer & Co., Inc. v. Bakelite Corp., 39 F. 2d 247 (C.C.P.A. 1930), *cert. denied*, 283 U.S. 852.

Interstate Commerce Act. The President cannot faithfully execute that law by failing for almost four years to appoint eleven members to the Commission.

The requirements imposed by the Supremacy Clause and the President's responsibility to faithfully execute the laws are further supported by the doctrine of separation of powers and its corollary concept of checks and balances.

For example, by virtue of Art. I, § 8, Cl. 3 of the Constitution, Congress enjoys the power to "regulate Commerce . . . among the several States. . . ." With respect to surface transportation, Congress has decided on an eleven-member agency, while the Executive's role is clearly limited to choosing *who* shall be on the agency, pursuant to the appointment power of Art. II, § 2, Cl. 2. These provisions reflect the concern of the framers of the Constitution that neither political branch possess unchecked power.

Similarly, in the formation of new legislation, Art. I, § 1 provides that "All legislative Powers herein shall be vested in a Congress of the United States. . .". The Constitution expressly limits the Executive's role to the veto-ing of laws he thinks unwise (Art. I, § 7, Cl. 2). Again, neither political branch is given unchecked power. However, by refusing to fill the vacancies, President Carter has, in effect, repealed that portion of the Interstate Commerce Act (49 U.S.C. § 10301(b)) establishing an eleven-member agency.

All these constitutional considerations were summarily brushed aside by the Seventh Circuit with the following observation (Appendix A-17):

> We need not be detained by the complex issues that would involve us here were this a proper action alleging that the President was acting illegally and asking that he be compelled to make the requisite number

> of appointments to the Commission. This is not a mandamus action where the President has been made a party defendant.

Contrary to the misconception of the Seventh Circuit, many times in our history, courts have heard and resolved disputes concerning the allocation of power between the legislative and executive branches without raising the bar that the President, as Chief Executive, was not a party to the suit. *Cf. Marbury* v. *Madison,* 1 Cranch 137 (1803); *Myers* v. *United States,* 272 U.S. 52 (1926); *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935); *Humphrey's Executor (Rathbun)* v. *United States,* 295 U.S. 602 (1935); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952); *Buckley* v. *Valeo,* 424 U.S. 1 (1976); *United States* v. *American Tel. & Tel. Co.,* 567 F. 2d 121, 125-126 (D.C. Cir. 1977).

Secondly, the Commission *is* a party herein. As a practical matter, the President could hardly fail for almost four years to fill multiple vacancies on the Commission without its active support and cooperation.

In this regard, the normal organization of the Commission, when it had eleven members, has been as follows:

> The Chairman is designated by the President from among the Commissioners. The Commissioners elect their own Vice-Chairman annually. The other nine Commissioners serve on one of three divisions: Operating Rights (Division One); Rates, Tariffs, and Valuation (Division Two); and Finance and Service (Division Three).

UNITED STATES GOVERNMENT MANUAL, 1975/1976 ed., 525. These work assignments were always adopted by the Commission following its own Organization Minutes (39 *Fed. Reg.* 25569, July 11, 1974), which had never been codified.

However, in December, 1977, the Commission adopted a new Part 1011 of title 49 of the Code of Federal Regulations (42 *Fed. Reg.* 65181, December 30, 1977) codifying work assignments, and superceding its former Organization Minutes. But instead of providing for *three* divisions of *three* Commissioners, plus a Chairman and a Vice-Chairman, as would be normally done, the new regulations provided:

> § 1011.3. Divisions of the Commission
>
> (a) There are two divisions of the Commission, each with three members, designated as division 1 and division 2.
>
> • • •

The Commission now describes its organization as follows:

> The Chairman is designated by the President from among the Commissioners. The Commissioners elect their own Vice-Chairman annually. The Vice-Chairman and the other Commissioners serve on one of two divisions.

UNITED STATES GOVERNMENT MANUAL, 1980/1981 ed., 664.

Thus, the Commission itself can hardly be viewed as an innocent bystander to President Carter's usurpation of legislative power and refusal to faithfully uphold the law.

Finally, mandamus is an extraordinary judicial remedy and will not issue where there is an adequate legal remedy available. *United States Ex Rel. Girard T. Co.* v. *Helvering*, 301 U.S. 540 (1937); FERRIS, EXTRAORDINARY LEGAL REMEDIES § 212 (1926).

In this regard, ACT has and rightfully sought a legal remedy by judicial review of agency orders in the Seventh Circuit. Furthermore, the Administrative Procedure Act expressly provides for the setting aside of agency orders "contrary to constitutional right, power, privilege, or im-

munity" (5 U.S.C. § 706(2)(B)). It has been held that the APA is mandatory by its terms and not merely declarative of guidelines to be followed. *Charlton* v. *United States*, 412 F. 2d 390 (3rd Cir. 1969).

In short, the Seventh Circuit has misconstrued the proper role of the Federal Judiciary in upholding the Constitution. *Cf.* the oft-quoted comment of Mr. Justice Harlan:

> . . . [T]he courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by the government or by individual persons, that violated . . . justice or were hostile to the . . . principles devised for the protection of the essential rights of property.

Monongahela Bridge Co. v. *United States*, 216 U.S. 177, 195 (1910).

II.

The Seventh Circuit Misconstrued The Commission's Quorum Provision

Congress created the Interstate Commerce Commission as a quasi-judicial body, delicately balanced in political representation and separate from the Executive Branch, so as to preserve its independence and prestige in rendering decisions. Congress desired that the Commission's decisions be made by collective and representative judgment, rather than by one or a few individuals, so that they would command public confidence and respect. As the Commission's responsibilities grew, Congress wisely increased its membership from its original five to its present eleven individuals. By staggering the terms of Commissioners, limiting the conditions of removal, providing for group action only through a quorum, and other safeguards, Congress

further sought to protect the stability, objectivity and competence of the Commission as a body in exercise of its vast judicial powers. To this body of experts Congress delegated all powers over surface transportation.

It is no historical accident here that the Commission has been without its required eleven members for an unreasonable period of time. Rather, it is the direct result of improper political manipulation by President Carter to direct the administrative process toward deregulation of all surface transportation. As the Seventh Circuit observed: "ACT adduces some evidence tending to show that the President's failure to appoint eleven Commissioners has been intentional." (Appendix A-15).

Nevertheless, the Seventh Circuit refused to intervene. This was accomplished by construing the Commission's quorum provision, § 10306(a), as requiring only a majority of existing Commissioners in office, rather than a majority (six) of the statutorily-authorized Commissioners. The Seventh Circuit also gave great weight to the "vacancy" provision, § 10301(e).

The legislative history is silent as to the proper construction of the "quorum" provision. However, it is a familiar presumption of statutory construction that the legislature knew the existing common law in the absence of a statute, and that it adopted that common law in the absence of an expression of contrary intent. See, 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5301 (1943); CRAWFORD, THE CONSTRUCTION OF STATUTES § 228 (1940). At the time of the enactment of the Act to Regulate Commerce, the general rule of the common law was that courts and other adjudicatory bodies may act only by a majority of their legally-constituted membership.

In *Frischer & Co., Inc.* v. *Bakelite Corp.*, 39 F. 2d 247 (C.C. P.A. 1930), *cert. denied*, 282 U.S. 852 (1930), the court enunciated the following rule applicable to tribunals performing adjudicatory functions:

> Where courts are concerned, it has been uniformly held, so far as we can ascertain, that a clear majority of all the legally constituted members thereof shall concur or no valid judgment may be entered except as may follow no decision. (*Ibid.*, at 255; citing cases).

In *Frischer*, the court held that a Tariff Commission's recommendation to the President signed by three of six Commissioners was valid even though this was not a majority of the total membership because the Tariff Commission was not exercising adjudicative functions.

Administrative agencies like the Tariff Commission, the court said, differ from courts in that they "exercise only the administrative functions delegated" and are "without judicial powers." (*Ibid.* at 254). The significant distinction under *Frischer*, therefore, lies in the difference between adjudicatory and administrative functions.

This clear distinction between the nature of the functions performed by the Tariff Commission, as stated in *Frischer*, and the functions of adjudicatory agencies such as the Interstate Commerce Commission, was clearly set forth by Judge Cardozo in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294 (1933). In that case, this Court, faced with the question of the nature of the "hearing" that the Tariff Commission was required to afford parties, held that the question turned on the nature of the functions performed, *i.e.*, the procedures "must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject." (*Ibid.*, at 319) The Court pointed out that "[t]he Tariff

Commission *advises;* these others *ordain.*'' (*Ibid.*, at 318)[2] The ''others'' specifically referred to by the Court were the Interstate Commerce Commission ''when regulating the conduct or the charges of interstate carriers, and that of the Public Service Commissions of the states when regulating the conduct or the charges of public service corporations.'' (*Ibid.*, at 317-318).

In this proceeding, the Commission was clearly functioning as a judicial tribunal. It adjudicated the right of Liberty Trucking Company to a Certificate of Public Convenience and Necessity. But, as stated by the court in *Frischer,* such a tribunal cannot enter a valid judgment except upon the concurrence of a ''clear majority of all the legally constituted members.'' (39 F. 2d at 255).

Other decisions and secondary sources also support the common law rule stated in *Frischer* that courts may act only by a majority of their legally constituted membership. In *Johnson* v. *State ex rel. Brannon,* 1 Ga. 271 (1846), the Georgia Supreme Court, in nullifying an order by a minority of a five-member court said: ''The law, organizing the Inferior Court, constitutes five justices that court. We hold a concurrence of the majority of the whole number necessary to the validity of that action.'' (*Ibid.*, at 274) Similarly, in *Paine* v. *Foster,* 9 Okla. 213, 53 P. 109 (1896), where only three members of a five-member court were sitting and all three could not concur on a reversal, the Oklahoma Supreme Court affirmed the lower court.

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2. (Emphasis added) The Court's reference here is to the fact that the Tariff Commission does not adjudicate or make final decisions; it only makes recommendations to the President, who may adopt or reject them.

This Court, before Congress established a specific statutory quorum,[3] adhered to a long-standing rule set forth by Chief Justice Marshall in *New York* v. *Miln*, 9 Pet. 85 (1835), and *Briscoe* v. *Commonwealth's Bank*, 8 Pet. 118 (1834):

> The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court [seven at the time].

Congress has authorized various administrative agencies to act by less than a majority, but it has always done so by express statutory provision. For example, the International Trade Commission, which has six authorized members, has the following quorum provision, 19 U.S.C. § 1330 (c)(6): "A majority of the Commissioners *in office* shall constitute a quorum. . . ." (Emphasis added). Yet, the Seventh Circuit chose to twist this language against ACT's position, instead of in favor of ACT's position. (Appendix A-13—A-14).

Under the reasoning of the Seventh Circuit, in which the authorized number of members needed for a quorum rises or falls depending on the composition of the Commission, if *one* Commissioner remained in office as the result of multiple vacancies, the Commission would still nonetheless have a quorum. This makes a mockery of the entire statutory scheme setting up the bipartisan, independent eleven-member Commission, but apparently would be sanctioned by the Seventh Circuit.

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3. A quorum of the Supreme Court consists of any six Justices (28 U.S.C. § 1). This requirement originated in the Act of April 10, 1869, c. 22, § 1, 16 Stat. 44, and had continued in the law since that time.

The Seventh Circuit's interpretation also opens the door to control by the Executive Branch, which Congress sought to prevent at all costs. In any situation where a minority of five or less Commissioners gained control of the Commission, the President could perpetuate this condition to suit his own political objectives by simply failing to make appointments to fill existing vacancies. This is no idle speculation, but is exactly what has occurred.

CONCLUSION

For the foregoing reasons this Court should issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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DATED: November, 1980.

APPENDICES

A—Opinion of the Court of Appeals

B—Opinion of the District Court

C—First Opinion of the Interstate Commerce Commission

D—Second Opinion of the Interstate Commerce Commission

E—First Order of the Interstate Commerce Commission

F—Second Order of the Interstate Commerce Commission

G—Complaint filed by Assure Competitive Transportation, Inc.

APPENDIX A

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 79-1867

ASSURE COMPETITIVE TRANSPORTATION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents,

LIBERTY TRUCKING COMPANY,

Intervenors,

No. 79-2033

WARREN TRANSPORT, INC.,

Petitioner,

COMMON CARRIER CONFERENCE—
IRREGULAR ROUTE,

Intervening Petitioner,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

LIBERTY TRUCKING COMPANY,

Intervening Respondent.

Petitions for Review of Orders of the
Interstate Commerce Commission.

(Caption Continued on Following Page)

No. 79-2133

ASSURE COMPETITIVE TRANSPORTATION, INC.,
Plaintiff-Appellant,

v.

INTERSTATE COMMERCE COMMISSION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-487—**Prentice H. Marshall**, Judge.

Argued April 11, 1980—Decided August 7, 1980

Before CASTLE, *Senior Circuit Judge,* SWYGERT and SPRECHER, *Circuit Judges.*

SWYGERT, *Circuit Judge.* These three consolidated matters arise from an order of the Interstate Commerce Commission granting an application for additional motor common carrier operating authority, and a district court order dismissing an action challenging the jurisdiction of the Commission to issue that and other orders. The issues presented are

1) Did the subject court properly conclude that it lacked subject matter jurisdiction to consider an action challenging the legality of numerous orders of the Commission on the basis that the Commission was illegally constituted?

2) Did the Commission correctly determine that a quorum under the Interstate Commerce Act, 49 U.S.C. § 10306(a), is a majority of an existing Commission rather than a majority of a full complement of eleven Commissioners?

3) Is the Commission illegally constituted as a matter of constitutional law because the President has

unreasonably delayed or intentionally declined to appoint eleven Commissioners?

4) Did the Commission, in granting Liberty Trucking Company's application for motor common carrier operating authority, alter the burden of persuasion traditionally required in such cases and if so, was a rule making required?

We affirm the district court's dismissal for lack of subject matter jurisdiction. We conclude further that the Commissioner's interpretation of 49 U.S.C. § 10306(a) was correct and that a quorum of the Commission participated in the challenged decisions. The constitutional challenge to the authority of the Commission must fail because the existing Commission was appointed pursuant to law and the Constitution. Whether the President has failed to exercise a nondiscretionary duty by unreasonably delaying or declining to appoint a full complement of eleven Commissioners is not before us because the President is not a party to this action. Finally, we hold that the Commission did not alter the burden of persuasion traditionally placed on applicants for motor common carrier operating authority.

I

These protracted administrative proceedings began in 1974 when Liberty Trucking Company (Liberty) filed an application for a certificate of public convenience and necessity authorizing it to transport general commodities (with certain exceptions) over regular routes between Chicago and Waterford and Burlington, Wisconsin, and between Burlington and Waterford and Elkhorn, Wisconsin. That application was granted by the Commission's Review Board Number 1 in 1976. On a petition for reconsideration by two of four carriers who had opposed the application, the Commission's Appellate Division 1 re-

versed the review board and denied the application. Although Liberty's petition for administrative review and for a finding that the proceeding involved an issue of general transportation importance was denied, the Commission on its own motion reopened the proceeding for reconsideration. In October 1978 the entire Commission granted the application. 130 M.C.C. 243 (1978) ("Liberty I").

Two protestants petitioned for administrative review. In addition, Warren Transport, Inc. ("Warren") among other carriers and Assure Competitive Transportation ("ACT") and the Common Carrier Conference—Irregular Route ("Conference"), among other carrier organizations, petitioned to intervene and for administrative review. The intervenors argued that the Commission had violated the Commissioner's criteria established in *Pan-American Bus Lines Operation,* 1 M.C.C. 190, 203 (1936), by modifying the burden of persuasion imposed on already-authorized carriers opposing an application for a certificate of public convenience and necessity. By a decision served on June 11, 1979 the Commission granted leave to intervene but denied the petitions for administrative review. 131 M.C.C. 573 (1979) (*"Liberty II"*). Warren filed a petition for judicial review in the Eighth Circuit which was transferred to this court. Conference was granted leave to intervene.

On June 20, 1979 ACT filed a petition with the Commission seeking to vacate the agency's decision for lack of jurisdiction. ACT pointed out that under 49 U.S.C. § 10301(b), "the Commission is composed of 11 members" and that under 49 U.S.C. § 10306(a), a quorum is defined as a majority of the Commission. ACT argued that at least six members or a majority of an eleven member Commission, are required to transact business. Because only five members participated in *Liberty II,* ACT contended

that the decision was void for lack of a quorum. On July 3, 1979 the Commission denied ACT's motion, citing 49 U.S.C. § 10301(e) which provides: "A vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all the powers of the Commission."[1] ACT filed a petition in this court seeking judicial review.

After the *Liberty I* decision was entered but before it was affirmed on administrative review in *Liberty II*, ACT filed a complaint in the United States District Court for the Northern District of Illinois seeking a declaratory order that the Commission was illegally constituted in violation of the Constitution and the Interstate Commerce Act, 49 U.S.C. § 10101 et seq., and asking that the Commission be enjoined from acting until "such time as there is a quorum appointed." ACT also requested that all Commission actions since June 30, 1978 be declared unlawful for want of a quorum. In response to a motion by the defendant Commission, the district judge dismissed the complaint for lack of subject matter jurisdiction, stating that under 28 U.S.C. § 2321 the proper method for challenging the legality of Commission actions was by appropriate review proceedings in the court of appeals.

The petitions for review taken from the *Liberty II* decision and from the Commission's denial of the motion to vacate for lack of jurisdiction as well as an appeal filed by ACT from the district court's order of dismissal were consolidated for purposes of review in this court.

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1. Only four Commissioners participated in the denial of the motion to vacate, and the legality of that decision is also challenged here.

II

We affirm the district court's dismissal of ACT's complaint which alleges that Commission orders since June 1978, which the membership of the Commission fell below six, are nullities as a matter of constitutional and statutory law because those orders were rendered by a Commission of fewer than six members.[2] The statutory provision governing judicial review of Commission actions is 28 U.S.C. § 2321(a), which provides:

> Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of the title.[3]

The principal exception to section 2321(a) is 28 U.S.C. § 1336, which vests jurisdiction in the district court in cases relating merely to the payment of money. That exception has been narrowly construed. In *Island Creek Coal Sales Co.* v. *ICC,* 561 F. 2d 1219 (6th Cir. 1977), the court held that an action challenging the power of the Commis-

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2. Although the President made additional appointments subsequent to the filing of the ACT's complaint, in its brief ACT argues that a Commission with fewer than eleven members is illegal as a matter of law because the President is unreasonably delaying or intentionally declining to appoint a full complement of eleven Commissioners.

3. Section 2321(a) was enacted in 1975 at which time Congress eliminated the three-judge district court procedure for review of Commission orders and transferred that jurisdiction to the court of appeals. Pub. L. 93-584, 88 Stat. 1917.

sion to issue certain orders, although also seeking monetary reparations, was not within the narrow exception for money matters only: "Attacks upon the validity of ICC orders are to be filed in the appropriate court of appeals." 561 F. 2d at 1222.

In the instant case, ACT does not claim that the district court has jurisdiction under the special monetary exception in 28 U.S.C. § 1336. Rather, ACT alleges jurisdiction under 28 U.S.C. § 1337(a) which provides: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce." We do not agree.

It is well established that a special statute vesting jurisdiction in a particular court cuts off the jurisdiction other courts might otherwise have under a more general statute. *See Venner* v. *Michigan Central R.R. Co.,* 271 U.S. 127 (1926). The District of Columbia Circuit has stated:

> [A]n impressive line of authority supports the . . . proposition that, even where Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular courts cuts off other courts' original jurisdiction in all cases covered by the special statute. *See, e.g., Macauley* v. *Waterman S.S. Corp.,* 327 U.S. 540, 543-545. . . . The Administrative Procedure Act itself provides that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute," except where such review would be inadequate. APA § 10(b), 5 U.S.C. § 703 (1070) . . . .

Inv. Co. Inst. v. *Bd. of Gov. of Federal Reserve Sys.,* 551 F. 2d 1270, 1279-80 (D.C. Cir. 1977) (additional citations omitted). *See also REA Express, Inc.* v. *Alabama Great Southern R.R. Co.,* 343 F. Supp. 851, 856 (S.D. N.Y.

1972), *affirmed*, 412 U.S. 934 (1973). In this case Congress has provided with particularity that challenges to orders of the Commission are to be brought in the court of appeals. As the Commission notes, if the district court could exercise jurisdiction under 28 U.S.C. § 1337, then section 2321 and its jurisdictional counterpart, 28 U.S.C. § 2342, providing for "exclusive jurisdiction" in the court of appeals, would be completely undermined, for any action challenging the validity of a Commission order is also an action arising under an act of Congress regulating commerce.

Public Utilities Commission v. *United States*, 355 U.S. 534 (1958), cited by ACT, is distinguishable. There the constitutionality of a section of the California Public Utilities Code enforceable by the California Public Commission was challenged by the United States. The Supreme Court held that because the issue was the constitutionality of that statute, it could be raised in the district court without first being raised before the Commission. In the instant case, the attempted constitutional challenge described in ACT's brief concerns the failure of the President to appoint Commissioners allegedly in violation of separation of powers principles in the Constitution. That issue is not properly before us because the President is not a party to this action. *See infra* at 15. There is no constitutional issue concerning the appointment or action of the existing Commission, which is the only named defendant in this lawsuit.[4] *See* section IV *infra*.

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4. In its complaint, ACT asserted that the Commission acted without a quorum which denied ACT due process of the law under the Fifth Amendment of the Constitution. The quorum issue is one of statutory construction, *see* section III *infra*, and the due process allegation, not discussed in ACT's brief, is without merit.

It is of course true that an agency may not finally decide the limits of its statutory power. *Social Security Board* v. *Nierotko,* 327 U.S. 358, 369 (1946). But this is not a case where the agency is the final arbiter, because here review is available in a court of appeals.[5] We distinguish *Leedom* v. *Kyne,* 358 U.S. 184 (1958), relied on by ACT, because in *Leedom,* the aggrieved employees could not seek review of the Board's action in another way. Here this court can and does decide the very issue raised in the district court by a petition for review of the Commission's order. *See* sections III and IV *infra.*

ACT contends that the district court has jurisdiction because not one but many Commission orders are challenged and a general question of law is raised. Those arguments must also be rejected. *See Macauley* v. *Waterman S.S. Corp.,* 327 U.S. 540 (1946); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938). In *B. F. Goodrich Company* v. *Northwest Industries, Inc.,* 424 F. 2d 1349 (3rd Cir.), *cert denied,* 400 U.S. 822 (1970), a private action was brought in the district court to enjoin an alleged violation of the Interstate Commerce Act.[6] In affirming the district court's dismissal for lack of jurisdiction, the Third Circuit stated: "The statutory procedure for review is applicable although an order is not directly attached—so long as the practical effect of a successful suit would contradict or countermand a Commission order." 424 F. 2d at 1353-54. It is not disputed that the precise effect of a successful suit in the instant case would countermand numerous orders of the Commission.

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5. An agency may rule on its authority in the first instance. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

6. At that time, review of Commission orders was provided by three-judge courts pursuant to then 28 U.S.C. § 2325.

III

ACT argues that the Commisson's order in *Liberty II* and the subsequent denial of ACT's motion to vacate *Liberty II* were both nullities because the Commission acted without a quorum, in violation of 49 U.S.C. § 10306(a) which provides *inter alia:* "A majority of the Interstate Commerce Commission . . . is a quorum for the transaction of business." As ACT reads that section, a majority of the statutorily prescribed eleven person Commission or a minimum of six Commissioners are necessary in order for the Commission to have jurisdiction to transact business. It is conceded that only five members of the Commission participated in *Liberty II* and only four in the decision to deny the motion to vacate.

The Commission denied ACT's motion to vacate for lack of jurisdiction by invoking 49 U.S.C. § 10301(e) which provides: "A vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all of the power of the Commission." Because Congress explicitly allowed for Commission action despite vacancies, the Commission construed the quorum provision together with the vacancy provision as requiring the participation of only a majority of an existing Commission, whatever its number, rather than a majority of a full Commission or six. Five of six Commissioners in office participated in *Liberty II* and four of six in the decision to deny the motion to vacate, in both cases a majority of Commissioners in office or a quorum according to the Commission's interpretation of the statute.

ACT argues that the vacancy provision relied on by the Commission does not "supersede" the quorum provision, so that while vacancies up to five do not prevent the Commission from acting provided a quorum of six exists,

more than five vacancies precludes the availability of a quorum. In support of its interpretation, ACT cites *FTC* v. *Flotill Products, Inc.*, 389 U.S. 179 (1967). In that case, the Supreme Court said of the vacancy provision in the Federal Trade Commission Act, 15 U.C.S. § 41, which is virtually identical to the vacancy provision at issue here: "We do not regard the provision in 15 U.S.C. § 41 for the exercise of powers by 'the remaining commissioners' in the case of 'a vacancy' as regulating the matter of a quorum." 389 U.S. 179, 181, n.3.[7] ACT reads *RTC* v. *Flotill Products, Inc.* as supporting its view that the vacancy provision in the Interstate Commerce Act, 49 U.S.C. § 10301 (e), although allowing the Commission to act without its full complement of eleven members, cannot be interpreted as affecting the number of Commissioners required for a quorum.

Moreover, ACT contends the fact that the Commission is powerless to act with more than five *temporary* absences would make it an "absurdity" if the Commission could act with more than five *permanent* absences. Finally, ACT asserts that defining a quorum as a majority of the Commissioners, however few in number they are, allows for Presidential control of the Commission through nonappointment of Commissioners, in complete derogation of the constitutional mandate that Congress and not the President is to regulate commerce. U.S. Const. Art. I, § 8, cl. 3.

We conclude that ACT's interpretation of the quorum provision is not correct. We agree with the Commission

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7. While the Federal Trade Commission Act did not specify the number of Commissioners necessary for a quorum, a rule of the Commission provided that a majority of the Commission constituted a quorum.

that a majority of the Commissioners actually in office constitutes a quorum.

It is undisputed that the vacancy section, 49 U.S.C. § 10301(e), vests in a Commission with fewer than eleven members the full power of a Commission of eleven. From the explicit language of that provision, we are persuaded that Congress intended those Commissioners in office, however many there are, to be "the Commission" for all purposes. "A majority of the Commission," the phrase used in the quorum provision, accordingly must mean a majority of those Commissioners in office.

The language from *FTC* v. *Flotill Products, Inc.*, 389 U.S. 179 (1967), relied in by ACT, does not compel a different result. In that case, the issue was not the definition of a quorum, but rather the number of Federal Trade Commissioners who had to concur in a decision. The Supreme Court began its opinion by noting that the Federal Trade Commission Act did not contain a quorum provision (although the Federal Trade Commission had enacted a quorum rule), and then in a footnote made the statement cited by ACT, to the effect that the vacancy provision in the Act did not regulate the matter of a quorum. We read that statement to mean that the vacancy provision was not a substitute for a quorum provision, because as the footnote went on to state, in other statutes Congress created specific quorum provisions where they were intended.[8] ACT would have us believe that the Supreme Court has indicated that a vacancy provision can never affect the matter of a quorum, but we cannot agree with

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8. The Interstate Commerce Act is cited as an example, a statute containing both quorum and vacancies provisions.

that interpretation. We read the *Flotill* dicta to mean that the vacancy provision in the Federal Trade Commission Act was not a substitute for a quorum provision, and therefore the Commission's quorum rule was valid under the law. It does not mean that where, as in our case, there is both a vacancy provision and a quorum provision, the vacancy provision cannot be utilized in construing the language in the quorum provision requiring "a majority of the Commission."

Moreover, it is not an "absurdity" for six temporary absences to disable the Commission while six permanent absences do not. "The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons." Robert's Rules of Order, § 3, p. 16 (1970). If the Commission consists of eleven Commissioners and only five participate in the decision, less than fifty percent of the existing decision-making body has actually made the decision. It is not that the number five is too small; it is that five Commissioners do not adequately represent the views of a Commission that is in fact comprised of eleven. In the case of a Commission of six, however, five participating Commissioners represent more than eighty percent of the existing decision-making body and thus their decision does not result in the kind of unrepresentive action which the quorum provision was designed to prevent.

The Commission refers us to 19 U.S.C. § 1330(c)(6), the quorum provision enacted by Congress when it created the six member International Trade Commission. "A majority of the Commissioners *in office* shall constitute a quorum. . . ." (emphasis added). There Congress explicitly permitted action by a majority of members currently in office, discrediting ACT's contention that fewer

than a majority of a full Commission is an "absurdity" Congress would never permit.[9]

Further support for our conclusion exists in the legislative history of section 10327(k)(1) of the Interstate Commerce Act, 49 U.S.C. § 10327(k)(1), formerly section 17(9)(f)(i). Section 17(9)(f)(i) required "not less than seven of the Commissioners" to agree on extensions of time in which to complete certain extraordinary rail proceedings. In 1978 the Commission advised Congress that it then had only seven members, and with one impending resignation, it would have only six. The Commission was concerned that the seven Commissioner requirement would render its power to extend certain deadlines a nullity. Thus the Commission recommended that the statute be amended to permit "a majority of the Commissioners" to authorize such extensions:

> This would modify the existing requirement that more than a simple majority vote for an extension, but would make the statute more adaptable to situations such as presently exist. Also, it would be more workable in situations where, for example, one or more Commissioners are absent due to illness or vacation plans.

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9. We reject the alternative argument from 19 U.S.C. § 1330(c)(6) that where Congress intends a quorum to be a majority of those in office, it enacts a provision that says so specifically, and that otherwise a majority must be whatever number represents a majority of a full Commission. It can just as easily be said that when Congress has intended to authorize a quorum consisting of a fixed number, it has done so expressly. *See, e.g.*, Civil Aeronautics Board, 49 U.S.C. § 1321(c) (three of five); *Federal Communications Commission*, 47 U.S.C. § 154(h) (four of seven).

Letter from Acting Chairman Betty Jo Christian to Senator Howard Cannon and Representative Harley Staggers (August 25, 1978). On November 8, 1978 Congress amended the language in accordance with the Commission's suggestion. Pub. L. No. 95-611, § 5, 92 Stat. 3090. Because the amendment was intended to establish the Commission's ability to act with only six members in office, even if one or more Commissioners was absent, we are clear that Congress used the language "a majority of the Commission" to mean a majority of the existing Commission. Significantly, the language in the amended section 10327 tracks the language of the quorum provision.

We conclude that a quorum under the Interstate Commerce Act, 49 U.S.C. § 10306(a), is a majority of an existing Commission, whatever its number.

IV

Apart from the issue of the quorum, which is a matter of statutory construction, ACT attempts to raise a constitutional challenge to the legality of the existing Commission to transact business. Although it is conceded that by statute the Commission is not barred from acting with vacancies, ACT contends that a Commission with fewer than eleven Commissioners is operating in violation of the Constitution when the President has either intentionally declined or unreasonably delayed in making appointments. ACT adduces some evidence tending to show that the President's failure to appoint eleven Commissions has been intentional. Moreover, ACT argues that the unreasonableness of the delay in appointing the full complement of Commissioners was established as a matter of law as of June 1978, when only five Commissioners remained whose terms had not expired and the membership fell below what ACT contends is a quorum.

ACT's constitutional challenge is based on the following provisions of the Constitution which are allegedly being violated: Art. II, § 2, cl. 2 (vesting in the President the power of appointment); Art. II, § 3, cl. 4 (requiring that the President "take care that the laws be faithfully executed"); Art. I, § 8, cl. 3 (providing that Congress shall regulate Commerce). ACT argues that the President has violated a nondiscretionary duty to appoint Commissioners, and as a consequence, he rather than the Congress is controlling commerce in violation of the separation of powers principles in the Constitution. The existing Commission, argues ACT, is therefore illegal.

We conclude that ACT's constitutional challenge is misdirected. The fact is that the existing Commissioners are each sitting pursuant to the specifications laid down by Congress, having been appointed by the President with the concurrence of the Senate. In addition, it was Congress which enacted the very provision that enables the Commission to exercise all its powers despite vacancies. 49 U.S.C. § 10301(e).

The problem, if there is one, lies not with the existing Commissioners, who have been validly appointed, or with the existing Commission, which is authorized by statute to act with vacancies. The only arguable illegality is on the part of the President, who may be, as alleged, intentionally or unreasonably failing to appoint a full complement of Commissions. In so withholding his power of appointment, ACT asserts, the President is effectively legislating a different size Commission than the eleven members Commission prescribed by Congress.[10]

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10. Section 10301(b), 49 U.S.C. § 10301(b), provides:
The Commission is composed of 11 members appointed by the President, by and with the advice and consent of the Senate.

It is clear that the President is not completely immune from judicial process for the sole reason that he is President. Our attention is called to the district court decision in *Minnesota Chippewa Tribe* v. *Carlucci,* 358 F. Supp. 973 (D.D.C. 1973), in which the plaintiffs sought to compel the President to appoint members of the National Advisory Council on Indian Education pursuant to the Indian Education Act, 20 U.S.C. § 1221g. The court held that the President had discretion to choose whom to appoint, but not discretion to decide that the Council should not be constituted, because the appointment of the Council was not an executive, discretionary or political act. *See also McQueary* v. *Laird,* 449 F. 2d 608, 611 (10th Cir. 1971) (mandamus will issue to require the exercise of permissible discretion).

We need not be detained by the complex issues that would involve us here were this a proper action alleging that the President was acting illegally and asking that he be compelled to make the requisite number of appointments to the Commission. This is not a mandamus action where the President has been made a party defendant.[11] ACT states that it has deliberately chosen not to bring a mandamus action, because it seeks to invalidate past acts of the Commission rather than to compel future acts of the President. However, we have concluded that the Commission's actions are not invalid on the basis of too few Commissioners and will not be invalid so long as the existing Commissioners have been validly appointed and the vacancy provision of the Interstate Commerce Act remains in effect. Thus the attempted constitutional chal-

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11. Only the President has been given the power to appoint Commissioners and he has not delegated that authority.

lenge to the jurisdiction of the Commission must fail. We express no opinion as to the likelihood of success of a mandamus action.

V

Petitioner Warren Transport, Inc. (Warren) and intervenor Common Carrier Conference—Irregular Route (Conference) attack the reasoning, though not necessarily the result, in the *Liberty I and Liberty II* decisions. 130 M.C.C. 243 (1978) and 131 .MC.C. 573 (1979).[12] Warren argues

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12. The challenged language in *Liberty I* reads:

Will the proposed service cause protestants to suffer competitive harm of such degree as to outweigh the benefits to the general public?—We conclude it will not. To make this determination we must "weight the competing interest." That is, we must balance the benefits flowing to the shipping and consuming public against the destructive impact a new service might have on existing carriers. Our ultimate concern, of course, is the public interest, and it is to determine the public interest that we undertake this balancing test. It should not be forgotten that a finding of potenial harm to protestants is not the end of our analysis. It is, in fact, only a beginning.

Stated differently, and from a protestant's perspective, the ultimate question might be whether protestant's evidence has established an interest worthy of regulatory protection from competition. Realistically, in order to stand a chance of prevailing, a protestant in most instances must convince us that the new competition is likely to materially jeopardize existing carriers' ability to serve the public. And, even then, it is quite possible that the benefits of heightened competition and new or imposed service may outweigh the potentially substantial harm to protestant.

(footnote continued on following page)

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> We recently discussed protestant's evidentiary burden in *P. C. White Truck Line, Inc., Ext.*—Atlanta, Ga., 129 M.C.C. 1, 9 (1978), where we noted that a protestant must introduce more than mere evidence of revenues it may lose to applicant. Such evidence demonstrates little more than that a protestant is operating under its authority—something it is legally obligated to do anyway. Protestants should also indicate how the potential loss of revenues will affect their operation. However, we must point out that we cannot simply presume traffic diversion or revenue loss. A protestant has the additional burden of offering some explanation of why or how authorization of a competitive service will lead to substantial traffic diversion and material revenue loss. This requires something more than a showing of traffic moving under authority in conflict with that sought.

130 M.C.C. at 245-46.

The challenged language in *Liberty II* reads:

> Once an appellant establishes a prima facie need for service, an absolute burden for an applicant, we then evaluate protestant's interest in the proceeding. A protestant is, and has always been, required to demonstrate an interest conflicting with the authority sought and its ability to fulfill the public need. Then after that threshold showing, a protestant must demonstrate that its conflicting interest is worthy of protection for the proposed competitive service. Our prior decision merely reaffirms this process, including the appropriate evidentiary showing expected of a protestant. See *e.g., P. C. White Truck Line* v. *I.C.C.*, 551 F. 2d 1326 (D.C. Cir. 1977); and *Consolidated Freightways Corp. of Del., Ext.—Phoenix.* 108 M.C.C. 379, 384 (1969).
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> Petitioner's criticism of the evidentiary burden we impose upon a protestant is unfounded. The day is

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that the Commission has altered the burden of persuasion imposed on applicants for motor carrier operating authority pursuant to section 10921 and 10922 of the Interstate Commerce Act, 49 U.S.C. §§ 10921 and 10922, from what it traditionally was under the Commission's decision in *Pan-American Bus Lines Operation,* 1 M.C.C. 190 (1936). Further, according to Warren, requiring protesting carriers to prove material harm from a grant of the application violates section 556(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d) which provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

Finally, Warren and intervenor Conference contend that the Commission has changed the burden of persuasion without complying with the rule making provisions of the Administrative Procedure Act, 5 U.S.C. § 553.

The Commission responds first and foremost that it has not altered the burden of persuasion from what it has traditionally been. Moreover, the Commission asserts that

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> past when conflicting authority coupled with pertient traffic abstracts will alone suffice to deny an application for operating rights. *Superior Trucking Co., Inc., Ext.—Agric. Machinery,* 126 M.C.C. 292 (1977). It is reasonable to require more from a protestant than a showing that the applicant might offer competition. Our prior decision appropriately requires that a protestant demonstrate how new competition might materially jeopardize its ability to serve the public. Further, we noted that injury to a protestant is not the end of our inquiry. After such a showing, we must determine if injury to a protestant would be contrary to the public interest.

131 .C.C. at 574-75.

its policy of requiring protestants to establish adverse material harm to defeat an applicant's prima facie case is firmly rooted both in section 556(d) of the Administratice Procedure Act, 5 U.S.C. § 556(d), and judicial precedent. Finally, the Commission argues that even if we find that did alter the burden of proof or establish new standards, a rule making was not required. Because we agree with the Commission that no departure from precedent occurred in the *Liberty* cases, we do not reach the rule making issue.

In *Pan-American Bus Lines Operation,* 1 M.C.C. 190, 203 (1936), the Commission stated:

> The question, in substance, is [1] whether the new operation or service will serve a useful purpose, responsive to a public demand or need; [2] whether this purpose can or will be served as well by existing lines or carriers; and [3] whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to public interest.

In *Liberty I,* the Commission applied those three criteria and found that applicant Liberty had demonstrated a public need that could not be satisfied by other carriers, in satisfaction of the first two *Pan-American* criteria. Next the Commission addressed the third criterion and concluded that the protesting carriers had failed to demonstrate that approval of the application would have a material adverse effect on existing operations.

Warren and Conference assert that by requiring that the protestant show material harm in order to prevent the granting of the application, the Commission departed from its past practice of imposing the burden of proving all three *Pan-American* criteria on the applicant. We have read each of the cases cited by the petitioners, and we

cannot agree that it was Commission practice to require the applicant to bear the burden of showing the absence of material harm to existing carriers. As we read those decisions, what an applicant was always required to prove was that there was a public need for the new transportation service. *See Mitchell Transport Inc. Extension-Fly Ash.*, 124 M.C.C. 303 (1976); *Dealers Transit, Inc., Extension-Wisconsin,* 123 M.C.C. 191 (1975); *Herrin Trans. Co. Extension-Pensacola, Fla.,* 82 M.C.C. 133 (1959); *Sauers Extension-East Cambridge, Mass.,* 61 M.C.C. 65 (1952). In no case did the Commission state that an applicant had the burden of proving the absence of material harm to existing carriers. In fact, in *Herrin Trans. Co. Extension-Pensacola, Fla., supra,* in which the Commission did discuss and find material harm to existing carriers, it was clearly the protestants who made the showing and not the applicant who failed to show the reverse.

The Commission, asserting that it has never required the applicant to bear the burden of proving that no material harm will ensue to existing carriers, cites its decision in *Consolidated Freightways Corp. of Del., Extension-Phoenix Area,* 108 M.C.C. 379, 384 (1969) in which it was stated that once a public need for the service was shown, the Commission required "convincing evidence that the proposed services would in all probability prevent an existing carrier from meeting its obligation to the public, or that the quality of overall service provided in the particular area served would be seriously threatened." In *Freeport Transport, Inc., Extension-Insulation,* 121 M.C.C. 66, 71 (1975), the Commission granted an application because a need for the service was demonstrated and the protestants had "not specifically shown that their operations [would] be affected adversely by our grant of the authority." *See*

also. P.C. White Truck Line, Inc., Extension-Atlanta, Ga., 129 M.C.C. 1, 9 (1978).[13]

Petitioner Warren also asserts that placing the burden of proving adverse material harm on the protestants violates section 556(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. . . . a sanction may not be imposed or a rule or order issued except . . . supported by and in accordance with the reliable, probative and substantial evidence.

The legislative history of that provision demonstrates that Congress did not intend always to burden an applicant with proving every factor the Commission would consider in making its decision. The Senate Report states:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that *other parties, who are proponents of some different result, also for that purpose have a burden to maintain.* Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the *proponents of a denial of relief must sustain such denial by that kind of evidence.*

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13. It is not disputed that an applicant must establish a prima facie case as specified in *Novak Contract Carrier Application*, 103 M.C.C. 555, 557 (1967), but that showing has never included proof of a lack of harm to existing carriers. An applicant must show the commodities shipped, the origin and destination points, the volume of traffic, the existing available service and deficiencies in existing service. *Novak Contract Carrier Application, supra.*

S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945) (emphasis added). The House Report says of section 556(d): "In other words, this section means that every proponent of a rule or order *or the denial thereof has the burden* of coming forward with sufficient evidence therefor." H. R. Rep. No. 1980, 79th Cong., 2d Sess. 34 (1946) (emphasis added).[14] So clear a legislative intent will not be overridden by the fact that the word "proponent" is used in the statute. *See United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543-44 (1940); *Aviation Consumer Action Project* v. *Washburn,* 535 F. 2d 101 (D.C. Cir. 1976).

On judicial review, the courts have upheld the Commission's practice of requiring protestants to bear the burden of showing material harm:

> [T]he Court in *Clarke* v. *United States,* 101 F. Supp. 587, 594 (D.D.C. 1951), concluded that the burden of proving any alleged adverse effect in the transportation industry resulting from the issuance of a common-carrier certificate should be placed on the protestants. The reasoning in *Clarke* has been adopted by the Second Circuit in the review of other administrative agencies, *Eastern Airlines, supra,* 271 F. 2d at 756 & n.15, and this Court sees no reason to adopt any other rule.
>
> . . . The Protestants must bear the burden of proving everything within their knowledge—to the effect that public convenience and necessity require that the certificate not be issued.

Trans-American Van Service, Inc. v. *United States,* 421 F. Supp. 308, 331 (N.D. Tex. 1976). In *May Trucking Co.* v. *United States,* 593 F. 2d 1349, 1356 (D.C. Cir. 1979),

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14. *See* K. Davis, Administrative Law Text § 14.12, at 287 (3d ed. 1972).

the District of Columbia Circuit upheld a Commission grant of authority, stating that the burden was on the protestant to demonstrate not only that the applicant would compete and divert some of their business but also that the new operation would actually promote inefficiency and waste or destroy the protestant's ability to compete.

We also cannot agree with petitioners that the *Liberty I* or *II* decisions indicate that the Commission will automatically grant an application unless there is a showing of material harm. In *Liberty I* and *II*, the Commission made clear that it was granting the application because Liberty had met its burden of proving the first two *Pan-American* criteria and the protestants had failed to show sufficient harm. If the petitioners are asserting that absent a showing of need, an application would still be granted if there was no showing of harm, we would have to reject that argument as totally unsupported by the *Liberty* decisions.[15] Thus, the petitioner's contention that the ultimate burden of persuasion in motor Common carrier applications is on the protestants is without merit. "Applicants for motor common carrier authority have the burden of establishing affirmatively that the present or future public convenience and necessity requires their proposed operations." *Mayfield Sons Trucking Co., Extension-Spotsylvania,* 129 M.C.C. 432, 434-435 (1978).[16]

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15. Similarly, the post-*Liberty* decisions cited by petitioners have all found a need for the service before granting the application.

16. We note that the Supreme Court describes the Commission's role in deciding whether to grant authority not as determining whether an applicant has sustained a burden of persuasion but rather as "weigh[ing] the competing in-

(footnote continued on following page)

Petitioners argue that the language in the *Liberty* decisions imposes so severe a burden on a protestant as to approach a requirement that the protestant demonstrate that he will go bankrupt if the application is granted. The Commission's conception of the value of increased competition, it is urged, has now made that factor almost impossible to outweigh. We respond first by noting that it was only three years ago that two circuits, including this one, reversed and remanded Commision decisions for failing to adequately consider the benefits of additional competition. *Sawyer Transport, Inc.* v. *United States,* 565 F. 2d 474 (7th Cir. 1977); *P. C. White Truck Line, Inc.* v. *Interstate Commerce Commission,* 551 F. 2d 1326 (D.C. Cir. 1977). Thus increased attention to the importance of competition may at least in part result from rather than violate judicial instruction. We do not find support for petitoners' contentions in either the facts or the language of the *Liberty* decisions.

Far from granting an application despite a finding of material harm to protesting carriers, in *Liberty* I the Commission found protestants' assertions of harm to be only "vague and speculative." 130 M.C.C. at 247. The Commission did go on to explain that even a showing of material

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(footnote continued from preceding page)

terests and arriv[ing] at a balance that is deemed "the public convenience and necessity." *Bowman Transp.* v. *Ark.-Best Freight System,* 419 U.S. 281, 293 (1974). That language supports the Commission's suggestion that it may not be bound by formal burden of proof requirements but instead is to evaluate the totality of factors. In that connection we note that in *Appleyard's Motor Transp. Co.* v. *I.C.C.,* 592 F. 2d 8, 11 (1st Cir. 1979), the First Circuit has stated that the *Pan-American* criteria, at issue in this case, are "a guideline, not a strait jacket."

harm may be outweighed by an overriding public benefit from the additional service. That language, however, does not diverge from the third *Pan-American* criterion as formulated in 1936: "[W]hether [a useful purpose] can be served by applicant with the new operation or service proposed without endangering or impairing the operation of existing carriers *contrary to the public interest.*" 1 M.C.C. at 203 (emphasis added).[17] Citing numerous decisions of the Commission, the District of Columbia Circuit recently stated:

> Injury to existing carriers through competition becomes relevant only when there is corresponding injury to the public. Congress designed the Interstate Commerce Act to benefit the people, not to create protested monopolies for those who profess to serve the public.

May Trucking Co. v. *United States,* 593 F. 2d 1349, 1356 (D.C. Cir. 1979) (footnotes omitted). Necessarily, the Commission's view of what the public interest demands has and will change over time. But the burden has remained on the applicant to demonstrate a need for the new service and on the protestant to prove material harm sufficient to outweigh that public need.

The petitions for review are denied and the district conurt decision appealed from is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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17. In *Liberty II,* the Commission did not reverse the ultimate burden as petitioners assert; rather that decision reiterates that a protestant has a burden to bear, once a need has been shown.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ASSURE COMPETITIVE TRANSPORTATION, INC.,
Plaintiff,

v.

THE INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.

No. 79 C 487

MEMORANDUM ORDER

This is an action by Plaintiff Assure Competitive Transportation, Inc., a not-for-profit corporation composed of over three thousand members with the common purpose of insuring that the Interstate Commerce Commission acts in accord with law and to assure that the public interest in adequate, efficient and economical motor carrier transportation is protected. Plaintiff complains of the alleged illegality of action taken by the Interstate Commerce Commission and its several present members upon the ground that the Commission is not composed of the statutorily required eleven members. Plaintiff seeks a declaration that the Commission's activities are illegal and an injunction restraining the Commission from further action until such

time as a quorum is appointed to transact business in accordance with the law. Jurisdiction is said to be in this Court under 28 U.S.C. § 1337.

Defendants have moved to dismiss upon the grounds that (1) judicial review of Commission rules, regulations and orders is exclusively in the Courts of Appeals, (2) plaintiff lacks standing because this dispute is merely a generalized grievance and (3) the complaint fails to state a claim upon which relief can be granted because the present Interstate Commerce Commission is lawfully constituted. We believe that defendants' motion is well-founded on all three grounds and accordingly it should be granted. However, for purposes of adjudication we limit our decision to the subject matter jurisdiction grounds urged by the defendants.

The proper vehicle for challenging the legality of the Commission's actions is in an appropriate proceeding brought for judicial review of the Commission's rules, regulations and orders in the Courts of Appeals pursuant to 28 U.S.C. § 2331. That section prescribes that the Courts of Appeals have exclusive jurisdiction to review Commission action. And plaintiff has now raised its allegation of the illegal composition of the Commission in Liberty Trucking Company, No. MC-72997, pending before the Commission. In due course plaintiff will be able to present its arguments to a Court of Appeals in the statutory proceeding.

By way of dictum, we also note that the records and files in this case show that the Commission is presently lawfully constituted of a chairman and five additional associate members, for a total of six out of eleven. And in our opinion is therefore lawfully constituted to transact business.

Defendants' motion to dismiss for want of subject matter jurisdiction is granted and a judgment will enter dismissing the action was want of subject matter jurisdiction.

ENTER:

PRENTICE H. MARSHALL,
United States District Judge.

DATED: September 5, 1979.

APPENDIX C

Served October 6, 1978

M-13031

INTERSTATE COMMERCE COMMISSION

No. MC-72997 (Sub-No. 26)

LIBERTY TRUCKING COMPANY, EXTENSION—GENERAL COMMODITIES

Decided September 12, 1978

This case deals primarily with the proper balancing of competing interests to determine whether a certificate of public convenience and necessity should be granted. It discusses the evidentiary burden a protestant must meet to establish an interest worthy of regulatory protection from competition.

Wayne W. Wilson and *Michael J. Wyngaard* for applicant.

Robert D. Aherns, Rolfe E. Hanson, James L. Joppe, Harold E. Stevens, and *John Duncan Varda* for protestants.

Decision of the Commission

GRESHAM, *Commissioner:*

Procedural Setting

Application seeks a certificate of public convenience and necessity authorizing regular-route, general-commodities service (with the usual exceptions) between Chicago, IL, and two small Wisconsin communities.

By a decision entered October 27, 1976, Review Board Number 1 granted the application. Following petitions for reconsideration filed by two of the four protestants, a majority of Appellate Division 1, by order of March 29, 1977, reopened the proceeding. Subsequently, by order entered November 23, 1977, a majority of the appellate division reversed the review board and denied the application in its entirety. Applicant then petitioned for reconsideration of the denial, which petition was denied by order entered January 31, 1978. Applicant lastly filed a petition seeking a finding that this proceeding involves an issue of general transportation importance. By order entered March 10, 1978, we denied the petition seeking a finding of general transportation importance but, on our own motion, reopened the proceeding for reconsideration on the present record.[1] The protestants of record in this proceeding are Advance Transportation Company (Advance), Knox Motor Service, Inc. (Knox), Motor Transport Company (Motor Transport), and Peet Frate Line, Inc. (Peet).[2]

We have considered the evidence, the prior decisions, and the pleadings. We find the detailed summary of facts contained in the review board's decision to be substantially correct in all material respects. As modified and supple-

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1. On April 14, 1978, protestant Motor Transport filed a motion to rescind our reopening. The motion is denied.

2. Protestants Advance and Knox did not petition for reconsideration of Review Board No. 1's grant. Nor did they reply to applicant's petition for reconsideration of Appellate Division I's denial. Their lack of participation is indicative of a loss of interest in the involved traffic and detracts from the weight their opposition normally would be accorded. Although their interests have been considered, their evidence will not be discussed in this decision.

mented, we adopt that factual summary as our own. Certain relevant facts will be restated for purposes of clarity of discussion.

Discussion and Conclusion

Has applicant established a public need for the proposed service?—We conclude it has. The thrust of applicant's service proposal is to provide overnight service between Chicago, on the one hand, and Burlington and Waterford, WI, on the other. Additionally, applicant proposes several additional connecting routes between portions of its existing routes and the proposed service points. Eleven shippers and four interlining carriers support this application. The supporting shippers express a need to move varying amounts of lading, both inbound and outbound. The evidence presented by shippers is set forth more fully in appendix A. The supporting motor carriers are primarily regular-route carriers of general commodities, which now conduct interline operations with applicant. These carriers generally state that it is difficult to obtain service to Waterford and Burlington and that applicant proposed a needed and useful public service. The carriers' evidence is further discussed in appendix B.

The evidence of the supporting witnesses is sufficient to establish a public need for the proposed service. There is sufficient specificity respecting the commodities to be transported, traffic volume, and points to and from which the traffic will move to afford the Commission a basis to determine that a public need exists for the proposed service.

Can existing carriers satisfy the demonstrated service need?—We conclude they cannot. Protestants Peet and Motor Transport serve Waterford and Burlington: Motor Transport with regular-route service, and Peet with ir-

regular-route service. Motor Transport offers service from the Chicago area to Waterford and Burlington through interline at Milwaukee with protestant Advance. Motor Transport asserts that the interline generally provides "second morning" delivery between Chicago and Waterford and Burlington.

Peet offers service between the Chicago area and Burlington and Waterford and contends that it generally provides overnight service. Peet has difficulty, however, in handling traffic from the facilities of General Motors and Ford Motor Company (Ford), shippers of significant volumes of the considered traffic.

While protestants are able to serve Burlington and Waterford, we believe applicant offers an improvement over existing service. Despite protestants' assertions to the contrary, we believe applicant is capable of providing overnight service as Burlington and Waterford are little more than 60 miles from Chicago. While Peet purportedly offers overnight service, we note that it is an irregular-route carrier and may not be able to provide the regular, scheduled service shippers seek. Peet also has difficulty originating traffic from Ford and General Motors, two of the major suppliers of traffic for the proposed service. While the record reveals that Peet is not responsible for its inability to originate traffic from the facilities of these suppliers, that fact is no help to the supporting firms in Burlington and Waterford. Furthermore, the policy of Ford and General Motors to limit access at their warehouses to selected carriers appears to be a legitimate business decision, which carriers selected on the basis of objective criteria. Absent a clear showing that Ford and General Motors limit access on an improperly discriminatory basis, we are unwilling to pass judgment on the

business decisions made by unregulated, nonparty enterprises.

Protestants have clearly failed to establish that they can provide service comparable to that proposed. Only Peet and Motor Transit actually serve Burlington and Waterford, and only Peet offers direct service from Chicago. Peet, however, is unable to originate a large part of the traffic. In other words, applicant offers an improvement over existing service, and there can be little question that the general public stands to benefit from the improved service.

Will the proposed service cause protestants to suffer competitive harm of such degree as to outweigh the benefits to the general public?—We conclude it will not. To make this determination we must "weigh the competing interest." That is, we must balance the benefits flowing to the shipping and consuming public against the destructive impact a new service might have on existing carriers. Our ultimate concern, of course, is the public interest, and it is to determine the public interest that we undertake this balancing test. It should not be forgotten that a finding of potential harm to protestants is not the end of our analysis. It is, in fact, only a beginning.

Stated differently, and from a protestant's perspective, the ultimate question might be whether protestant's evidence has established an interest worthy of regulatory protection from competition. Realistically, in order to stand a chance of prevailing, a protestant in most instances must convince us that the new competition is likely to materially jeopardize existing carriers' ability to serve the public. And, even then, it is quite possible that the benefits of heightened competition and new or improved

service may outweigh the potentiality substantial harm to protestants.

We recently discussed protestant's evidentiary burden in *P.C. White Truck Line, Inc., Ext.—Atlanta, Ga.,* 129 M.C.C. 1, 9 (1978), where we noted that a protestant must introduce more than mere evidence of revenues it may lose to applicant. Such evidence demonstrates little more than that a protestant is operating under its authority—something it is legally obligated to do anyway. Protestants should also indicate how the potential loss of revenue will affect their operations. However, we must point out that we cannot simply presume traffic diversion or revenue loss. A protestant has the additional burden of offering some explanation of why or how authorization of a competitive service will lead to substantial traffic diversion and material revenue loss. This requires something more than a showing of traffic moving under authority in conflict with that sought.

For the third quarter of 1975, Motor Transport received total revenues of $33,619 for service to and from Burlington, and Peet derived approximately $73,500 for its service to and from Burlington and Waterford for the first 6 months of 1975. Peet asserts that it had suffered a decline in total revenues from the first three quarters of 1974 and that revenues declined to $2,019,000 for the same period in 1975. It argues that approval of this application will subject its Burlington-Waterford traffic to diversion and that this traffic should be protected to avoid further financial decline.

While both Peet and Motor Transport have demonstrated that they now serve Burlington and Waterford, they have demonstrated little more. Motor Transport has not demonstrated that its current Burlington-Waterford

traffic would be endangered by approval of this application, or, even if this traffic were impaired, that protestants' overall operations would be jeopardized. Moving to the showing by protestant Peet, we again find that protestant has failed to demonstrate that approval of this application would pose anything more than a theoretical threat to existing operations. While we naturally are sympathetic with Peet's declining revenues, the record in this proceeding does not support the conclusion that approval of this application will have a material bearing on the future fortunes of this protestant.

As we reject protestants' and speculative assertions of harm, we are obviously unable to conclude that approval of this application will have an adverse impact on the public interest. Therefore, we conclude that the public benefits flowing from approval of this application outweigh any potential adverse impact on protestants. This application will be approved.

Findings

On reconsideration, we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicles, of general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment): (1) between Waterford, WI, and Chicago, IL, serving no intermediate points, (a) from Waterford, east over Wisconsin Highway 20 to the junction of Interstate Highway 94, then south on Interstate Highway 94 to Chicago, and return over the same route, and (b) from Waterford, east over Wisconsin Highway 20 to the junction of U.S. Highway 45, then south over U.S. Highway 45 to Chicago, and

return over the same route; (2) between Burlington, WI, and Chicago, IL, serving no intermediate points, (a) from Burlington, east over Wisconsin Highway 11 to the junction of Interstate Highway 94, then south over Interstate Highway 94 to Chicago, and return over the same route, (b) from Burlington, east over Wisconsin Highway 11 to the junction of U.S. Highway 45, then south over U.S. Highway 45 to Chicago, and return over the same route, (c) from Burlington, east over Wisconsin Highway 43 to the junction of Interstate Highway 94, then south over Interstate Highway 94 to Chicago, IL, and return over the same route, (d) from Burlington, east over Wisconsin Highway 43 to the junction of U.S. Highway 45, then south over U.S. Highway 45 to Chicago, and return over the same route, (e) from Burlington, south over Wisconsin Highway 83 to the junction of Wisconsin Highway 50 at or near New Munster, WI, then east over Wisconsin Highway 50 to the junction of Interstate Highway 94, then south over Interstate Highway 94 to Chicago, and return over the same route, and (f) from Burlington, south over Wisconson Highway 83, to the junction of Wisconsin Highway 50 at or near New Munster, then east over Wisconsin Highway 50 to the junction of U.S. Highway 45, then south over U.S. Highway 45 to Chicago, and return over the same route; (3) between Waterford, WI, and Burlington, WI, serving no intermediate points, over Wisconsin Highway 83; (4) between Burlington, WI, and the junction of Wisconsin Highway 36 and U.S. Highway 12 at or near Lake Geneva, WI, over Wisconsin Highway 36 serving no intermediate points, and serving the described junction for the purposes of joinder only; (5) between Burlington, WI, and Elkhorn, WI, over Wisconsin Highway 11, serving no intermediate points and serving Elkhorn for the purpose of joinder only; (6) between Waterford, WI, and the

junction of Wisconsin Highway 20 and U.S. Highway 12, over Wisconsin Highway 20, serving no intermediate points and serving the described junction for purposes of joinder only; (7) between the junction of U.S. Highway 41 and Interstate Highway 94 (which junction is located in Illinois about 1 mile south of Wisconsin and about 1 mile west of Russell, IL) and Chicago, IL, over U.S. Highway 11, serving no intermediate points and serving the described junction for the purpose of joinder only; and (8) between the junction of Wisconsin Highway 50 and U.S. Highway 12 (which junction is located at or near Lake Geneva, WI), and the junction of Wisconsin Highway 50 and Wisconsin Highway 83 (which junction is located at or near New Munster, WI) over Wisconsin Highway 50, serving no intermediate points and serving the described junctions for the purpose of joinder only. Conditions: (1) The authority granted shall not be construed as creating duplicate operating rights; and (2) the authority granted, and any of applicant's existing authority duplicated, shall be construed as creating only a single operating right.

Applicant is fit, willing, and able properly to perform the service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations. This decision will not significantly affect the quality of the human environment.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and with the Commission's regulations, within the time specified below, an appropriate certificate will be issued.

COMMISSIONER STAFFORD, dissenting:

I would deny this application. My reasons are set forth in the division decision served December 2, 1977. These two Wisconsin communities presently enjoy, on a daily

basis, both joint-line and direct serve to and from the Chicago gateway. After weighing the competing interests in this proceeding, I believe that a grant of authority will result in destructive competition contrary to the national transportation policy.

In addition, I am concerned over certain language used in this decision. The majority states that even after a protestant has presented convincing evidence that new competition will "materially jeopardize" its operations, it is still "quite possible that the benefits of heightened competition and new or improved service may outweigh the potentially substantial harm to protestants." In effect, this makes the factor of increased competition almost the sole criterion for a grant of authority. Furthermore, the quoted language makes a mockery of our stated intention to weigh and balance the competing interests in these application proceedings.

It is ordered:

The decision of Appellate Division I on reconsideration entered November 23, 1977, is vacated.

The application is granted. However, unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) the Interstate Commerce Act within 90 days after service of this decision the grant of authority will be void.

By the Commission, Chairman O'Neal, Vice Chairman Christian, and Commissioners Murphy, Brown, Stafford, Gresham, and Clapp. Commissioner Stanfford dissenting and Commissioner Murphy not participating.

H. G. HOMME, JR.,
Acting Secretary.

(SEAL)

APPENDIX A

Supporting shippers

Below is a summary of the evidence submitted by the 11 supporting shippers:

(1) *Bill Shallock Ford, Inc. (Shallock),* is an authorized Ford dealer in Burlington offering sales of new and used cars as well as a full repair service. It receives between 100 and 300 pounds of a wide array of automotive parts each week from the Ford warehouse in Melrose Park, IL; Melrose Park is located in the Chicago commercial zone. Services are now provided in interline service by protestants Advance and Motor Transport; however, Shallock indicates that overnight service is not available and that this is unacceptable because parts are frequently needed on short notice. Shallock estimates that it loses approximately $2,000 a year because overnight service is unavailable.

2. *Cunningham Buick-Olds, Inc.,* is an authorized Buick-Oldsmobile dealer in Burlington selling both new and used cars and providing a full repair service. It receives 500 to 1,000 pounds of parts every 2 weeks from the General Motors warehouse in Broadview, IL, which is located in the Chicago commercial zone. Service is now provided through interline by Advance and Motor Transport. Shipper complains that needed overnight service is unavailable with service now taking at a minimum. 2 days.

(3) *Edstrom Industries, Inc. (Edstrom),* of Waterford, manufactures automatic watering systems for animals. It ships outbound, finished products and related supplies three or four times a month, with each shipment weighing between 200 and 600 pounds. Shipments are made to customers throughout the East and Midwest. Shipper indicates that it uses United Parcel Service primarily because exist-

ing motor service is too slow. Edstrom cites specific problems with protestant Motor Transport's services.

4. *Graf's Garage* is a Chevrolet dealer in Waterford selling new and used cars and providing full repair service. It receives emergency shipments of repair parts about once a week from the General Motors warehouse in Broadview. It is served in interline service and asserts that it receives, at best, 2-day service when it needs overnight deliveries.

5. *International Harvester Sales and Service* is an International Harvester dealer in Burlington merchandising a complete line of trucks, farm implements, and hardware and other material. It supports applicant for emergency shipments of parts and supplies from the International Harvester warehouse in Broadview. This service is now provided by private carriage because existing motor common carriage is too slow to meet shipper's needs.

6. *John Lynch Chev-Pont Sales, Inc. (Lynch),* is an authorized Chevolet and Pontiac dealer in Burlington, selling new and used cars and offering a full line of body and engine repairs. It supports applicant for the movement of automotive supplies from the General Motors warehouse in Broadview. A regular shipment of from 200 to 400 pounds moves every 2 weeks, and emergency shipments move occasionally. Shipper is served by the Advance-Motor Transport interline service, and numerous instances of slow service are cited. Lynch asserts that applicant's overnight service from Broadview is a needed improvement in available service.

7. *Schlitz Linoleum Company (Schlitz),* is a retail seller of carpeting and linoleum in Burlington. It supports applicant for 3 weekly shipments, weighing 300 to 400 pounds each, from distributors in Chicago and other points. Schlitz

asserts that it has been unable to obtain as much merchandise as it desires from Chicago because transportation service is simply not adequate. Having available applicant's overnight service from Chicago would provide this shipper a wider variety of suppliers.

8. *Schuette and Daniels, Inc.,* is a retail furniture store in Burlington. It receives about 20 shipments monthly comprised of a full range of furniture products from suppliers located throughout the United States. Shipper is now served by specialized furniture carriers and, to a certain extent, protestants. It states that service from specialized carriers is too infrequent and that present carriers have a high damage rate for their shipments. It supports applicant as an alternative to existing carriers and for more timely service from Chicago.

9. *TSC Industries (*TSC*),* operates a retail outlet in Burlington selling a wide variety of merchandise such as paint, tires, tools, clothing, sporting equipment, appliances, and agricultural implements. It receives daily shipments varying in size from 100 pounds to 1,600 pounds from suppliers throughout the United States; these shipments are funneled through the gateways of Chicago, Rockford, and Madison. TSC does not describe in detail what for-hire services are used but it appears that to some extent it is served by Motor Transport and Peet. It supports applicant to receive more expeditious service from Chicago and Rockford than is now offered by protestants.

10. *Wan-Dell Company (Wan-Dell),* manufactures metal holders that are shipped to companies that customize trucks to carry Culligan water softening equipment. It receives inbound shipments of steels and sends outbound shipments of finished metal holders. Inbound shipments originate from such points as Erie, PA, or Chicago, IL,

while outbound shipments are destined to customer locations at points such as Boyertown, PA, Piscataway, NJ, Chicago and Bloomington, IL, and Kirkwood, MS. Wan-Dell averages 12 to 14 outbound shipments monthly with inbound traffic volumes being roughly equal to outbound movements. Motor Transport now handles all of the considered traffic; however, shipper seeks applicant's broader and more expeditious service.

11. *Waterford Aluminum Company, Inc.,* manufactures aluminum, brass, and lead castings for such concerns as General Electric, Kerney Truck, and J.I. Case. It supports applicant for about 50 percent of its interstate traffic which involves outbound traffic of about 2,000 pounds each month and inbound traffic of more than 100,000 pounds annually. Protestant Motor Transport has been used primarily in the past; however, applicant's proposal for the interline at the Chicago gateway would provide sipper with more flexible and expeditious service than is now available.

APPENDIX B

Supporting carriers

1. *Kain's Motor Service Corp.,* is a regular-route general commodities carrier serving northern Indiana, seeking an interline with applicant at Chicago for traffic destined to Burlington and Waterford.

2. *Rooks Transfer Lines, Inc.,* is a regular-route general commodities carrier operating as pertinent, between Chicago and certain points in Michigan. Rooks proposes an interline with applicant at the Chicago gateway.

3. *Service Transportation Lines, Inc.,* is a regular-route general commodities motor carrier operating exclusively in Illinois.

4. *Shippers Dispatch, Inc.,* is a general commodities carrier serving points in Illinois, Indiana, Ohio, New York, and Michigan. It indicates that in the past it has had difficulty getting traffic moved to Burlington and has actually, at times been forced to reject traffic destined to Burlington. It proposes to interline with applicant at Chicago.

APPENDIX D

Served June 11, 1979

M-13095

INTERSTATE COMMERCE COMMISSION

No. MC-72997 (Sub-No. 26)

LIBERTY TRUCKING COMPANY, EXTENSION—GENERAL COMMODITIES

Decided May 31, 1979

This decision affirms and clarifies our earlier decision (130 M.C.C. 243 (1978)) in this proceeding, which discussed the proper balancing of competing interests in operating right application proceedings. Petitions for administrative review are denied.

Appearances shown in prior report. In addition:

Nelson J. Cooney, Gary D. Dunbar, Stanley Hamilton, Harry J. Jordan, Robert J. Molinaro, Todd A. Peterman, Kenneth E. Siegel, Gregory A. Stayart, Daniel C. Sullivan, and *Kurt E. Vragel, Jr.*, for intervenors.

Decision

BY THE COMMISSION:

We have considered the record in this proceeding and the petition for leave to intervene, administrative review, and relief in the alternative filed by American Trucking Association, Inc.; the petition for administrative review filed by Peet Frate Line, Inc.; the petition for leave to intervene filed by Warren Transport, Inc.; the petition for

leave to intervene, administrative review, or alternatively, institution of a rulemaking proceeding, filed by Common Carrier Conference-Irregular Route; the petition for leave to intervene filed by the Regular Common Carrier Conference, Inc.; the petition for leave to intervene, administrative review, and stay filed by Assure Competitive Transportation, Inc.; and applicant's replies to all these petitions except that of Warren Transport, Inc. Applicant also moves to strike the petition of Common Carrier Conference-Irregular Route because it was untimely filed in violation of rule 97(e) of the Commission's General Rules of Practice (49 CFR 1100.97(e)).

Applicant's motion to strike will be denied and the various petitions for leave to intervene will be granted. The petitions for administrative review and for various alternative relief will be denied. Petitioners raise no new, significant, or novel issues not adequately discussed in prior decisions in this proceeding. The nature of the arguments raised in the various pleadings indicate that petitioners largely misread or misconstrue our prior decision and its foundations. For this reason, and because we are aware of the public's interest in our recent decision, we will briefly discuss petitioners' major misconceptions.

While the various petitioners couch their criticisms of our prior decision in different terms, their basic arguments are the same. Primarily, they argue that we altered our standards for deciding operating rights proceedings. We have allegedly abandoned the traditional *Pan-American*[1] decisional framework, reversed protestants' burden of proof, and made competition the only factor to be con-

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1. *Pan-American Bus Lines Operations,* 1 M.C.C. 190, 203 (1936).

sidered in these proceedings. Particular dissatisfaction is directed to our assertion that it is possible that the benefits of heightened competition may outweigh even substantial harm to protestants.

These arguments evince an imprecise and uncritical reading of our prior decision. First, that decision is firmly footed in *Pan-American* criteria. Our decision asks three questions: has applicant established a public need for the proposed service; can existing carriers satisfy the demonstrated service need; and, will the proposed service cause protestants to suffer competitive harm of such degree as to outweight the benefits to the general public? Far from eroding or undermining *Pan-American,* these questions are the cornerstones of that decision and the decisional framework it establishes.[2]

To argue that we have somehow altered or "reversed" a protestant's burden of proof misreads our prior decision, as well as much Commission and court precedent. Our mission is exercising entry control is to foster the public interest by preventing overcapacity. In pursuit of that goal, we require, and have always required, a certain evidentiary showing by applicant seeking operating authority and by a protestant opposing an application for operating authority.

Nothing in our prior decision changes that in any way. Once an applicant establishes a prima facie need for serv-

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2. In Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation,* the Commission is reevaluating the traditional *Pan-American* criteria and considering whether they should be altered in light of present economic conditions in the motor carrier industry. However, the decision in this proceeding, as noted, represents an application of the traditional criteria.

ice, an absolute burden for an applicant, we then evaluate protestant's interest in the proceeding. A protestant is, and always has been, required to demonstrate an interest conflicting with the authority sought and its ability to fulfill the public need. Then after that threshold showing, a protestant must demonstrate that its conflicting interest is worthy of protection for the proposed competitive service. Our prior decision merely reaffirms this process, including the appropriate evidentiary showing expected of a protestant. See *e.g., P. C. White Truck Line* v. *I.C.C.,* 551 F. 2d 1326 (D.C. Cir. 1977); and *Consolidated Freightways Corp. of Del., Ext.—Phoenix,* 108 M.C.C. 379, 384 (1969).

Petitioners' criticism of the evidentiary burden we impose upon a protestant is unfounded. The day is past when conflicting authority coupled with pertinent traffic abstracts will alone suffice to deny an application for operating rights. *Superior Trucking Co., Inc., Ext.—Agric. Machinery,* 126 M.C.C. 292 (1977). It is reasonable to require more from a protestant than a showing that the applicant might offer competition. Our prior decision appropriately requires that a protestant demonstrate how new competition might materially jeopardize its ability to serve the public. Further, we noted that injury to a protestant is not the end of our inquiry. After such a showing, we must determine if injury to a protestant would be contrary to the public interest.

The essence of this burden was recently forcefully reaffirmed in *May Trucking Co.* v. *United States,* 593 F. 2d 1349 (D.C. Cir. 1979). The court stated at 1356:

> Competition frequently entails a loss of customers, but ordinarily it is in the public interest, not contrary to it. [Citing by footnote *P. C. White, supra; Sawyer Transp., Inc.* v. *United States,* 565 F. 2d 474, 478 (7th

> Cir. 1977); and *Highway Tours, Inc., Common Carrier Application,* 128 M.C.C. 595, 603 (1977) (since affirmed in *Greyhound Lines* v. *United States,* No. 78-1313 [D.C. Cir. May 2, 1979.]) It was incumbent upon [protestant] to show not merely that [applicant] would compete with other carriers and might succeed in luring some of their customers away, but that [applicant's] operations would likely promote inefficiency and waste or destroy [protestant's] ability to compete. [Citing by footnote, among others, *Latin Express Service, Inc., Com. Car. Applic.,* 128 M.C.C. 740, 746-47 (1978) and *Wayne Daniel Truck, Inc.—Ext. —Candy,* 128 M.C.C. 1, 9 (1977).]
>
> Injury to existing carriers through competition becomes relevant only when there is a corresponding injury to the public. Congress designed the Interstate Commerce Act to benefit the people, not to create protected monopolies for those who profess to serve the public. [Citing by footnote *Northwest Transp. Serv., Inc., Ext.—Colorado,* 128 M.C.C. 622, 625-26 (1977).]

Accord, *Appleyard's Motor Transp. Co.* v. *ICC,* 592 F. 2d 8, 11 (1st Cir. 1979) ("This language [in Pan-American] is a guideline, not a straitjacket. The important thing is the protection and promotion of the public interest, not that of the certificate carriers.")

In our September 12 decision, we stated that even after a protestant has demonstrated that a grant of authority would materially jeopardize its ability to serve the public "it is quite possible that the benefits of heightened competition and new or improved service may outweigh the potentially substantial harm to protestants." This is now new law—it is axiom. *Atlanta—New Orleans Motor Freight Co.* v. *United States,* 197 F. Supp. 364, 370 (N.D. Ga. 1961); *Norfolk Southern Bus Corp.* v. *United States,* 96 F. Supp. 756, 761 (E.D. Va. 1950) affirmed Mem. 340 U.S. 802

(1951), *P.C. White Truck Line, Inc., Ext.—Atlanta, Ga.*, 129 M.C.C. 1 (1978); *Chief Freight Line Co. Ext.—Dallas*, 126 M.C.C. 794 (1977); *Milne Truck Lines, Inc., Ext.—San Francisco*, 121 M.C.C. 149, 165 (1975). We will not deny the public the benefits of an improved service or heightened competition merely to protect the inefficient or to insulate existing carriers from more vigorous competition.

Competition is generally presumed to be in the public interest, not contrary to it. *May Trucking Co., supra.* This concept goes to the heart of the third *Pan-American* criterion—will the public interest best be served by a grant that admittedly would harm existing carriers but overall would advance the public interest. *Kaylor and Stuart Extension—Copperhill, Tenn.*, 124 M.C.C. 441, 447 (1976); *Patterson Extension—York, Pa.*, 111 M.C.C. 645, 650 (1970). We must reemphasize that our mission is to further the public interest, not the private interest of any particular carrier. Harm to a particular carrier becomes relevant only if there is a corresponding impact on the public interest. Thus, our balancing of these relevant considerations could lead, in any given case, to the conclusions that the potential substantial harm to an existing carrier outweighs the value of additional service and that a denial of the application would best serve the public interest. *Appleyard's, supra* at 11. However, we affirm our prior finding that the record in this case leads us to conclude that Liberty's proposed additional service is warranted.

COMMISSIONER STAFFORD, dissenting:

I adhere to my prior position in this case and would deny the application. Furthermore, I remain convinced that we are effectively making the factor of increased competion the sole criterion for a grant of authority. See my dissenting opinion in this case at 130 M.C.C. 249.

In addition, I find some of the language in today's decision to be both inflammatory and insensitive. Contrary to the majority statement, I cannot dismiss petitioners' arguments as "major misconceptions." These parties expressed a very genuine concern about the implications of our prior decision. The tone of our response implies that petitioners needed to be reminded that "our mission is to further the public interest, not the private interest of any particular carrier." Petitioners acted in good faith and I dissent from the harsh tone of this decision.

It is ordered:

Applicant's motion to strike is denied.

American Trucking Associations, Inc., Warren Transport, Inc., Common Carrier Conference-Irregular Route, Regular Common Carrier Conference, Inc., and Assure Competitive Transportation, Inc., are permitted to intervene in this proceeding with the right to participate in all further proceedings.

The petitions for administrative review are denied. The application is granted as indicated in our decision of September 12, 1978.

If applicant does not comply with the appropriate requirements set forth in the Code of Federal Regulations (49 CFR 1043, 1044, and 1310) within 90 days after the date of service of this decision, the grant of authority will be void, and the application will stand denied.

This decision will be effective 15 days from its date of service.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp, and Christian. Commissioner Stafford dissented. Commissioner Christian absent and not participating.

H. G. HOMME, JR.,
Secretary.

(SEAL)

NOTICE: This proceeding is now administratively final within the meaning of 49 CFR 1101.2(f) of the Commission's regulations; and, in accordance with the provisions of section 558(c) of the Administrative Procedure Act, and corresponding temporary authority expires and operations thereunder must cease upon the effective date of this decision, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleading in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

APPENDIX E

INTERSTATE COMMERCE COMMISSION DECISION

Docket No. MC-72997 (Sub-No. 26)

LIBERTY TRUCKING COMPANY, EXTENSION— GENERAL COMMODITIES

Decided July 3, 1979

My petition filed June 20, 1979, intervenor Assure Competitive Transportation, Inc. (ACT), request the Commission to vacate its final decision in this case, served on June 11, 1979, and reported at 131 M.C.C. 573. ACT contends that the Commission did not have jurisdiction to enter this decision for lack of a quorum. Five of the six current members of the Commission participated in this final decision, with one of the five members dissenting. ACT argues that 49 U.S.C. 10306(a) defines a quorum as a majority of the Commission. In its view, because the Commission is composed of 11 members under 49 .S.C. 10301(b), the agency can thus transact business only if a majority of 11 — *i.e.,* six — Commissioners participate in the decision.

ACT's arguments overlook a significant provision of the statute — 49 U.S.C. 10301(e) — that states: "A vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all of the powers of the Commission." This provision, which first appeared in the legislation creating the Commission (see Act of February 4, 1887, ch. 104, § 11, 24 Stat. 383), could not be clearer. It reflects an unmistakable Congressional

intent to facilitate the conduct of business notwithstanding vacancies. Indeed, that statute is so plain that there is no basis for reading it other than as it is written.[1]

Thus, under the quorum provision upon which ACT relies, a quorum is a majority of the six current members of the Commission, or four. Five Commissioners participated in the final decision in this case, clearly constituted a quorum. The Commission had jurisdiction to enter the June 11 decision.

It is ordered:

ACT's petition to vacate is denied.

By the Commission, Chairman O'Neal, Vice Chairman Brown, Commissioners Stafford, Gresham, Clapp, and Christian. Commissioners Stafford and Gresham did not participate in the disposition of this proceeding.

(SEAL)

H. G. HOMME, JR.,
Secretary.

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1. ACT relies on inapposite principles of corporate law for its view that "the number for a quorum remains the same, even though there may be vacancies in a Commission or other body" (*e.g., Cirrincione* v. *Polizzi*, 14 App. Div. 2d 281, 220 N.Y.S. 2d 741, 743 (1961)). Indeed, that rule applies because most corporate by-laws *require* the filling of vacancies on the board. *Ibid.* By contract, 49 U.S.C. 10301(e) provides for the continued functioning of an independent regulatory agency — including the formation of a quorum — despite vacancies.

APPENDIX F

INTERSTATE COMMERCE COMMISSION DECISION

Docket No. MC-72997 (Sub-No. 26)

LIBERTY TRUCKING COMPANY, EXTENSION—GENERAL COMMODITIES

Decided July 3, 1979

By petition filed June 21, 1979, intervenor Assure Competitive Transportation, Inc. (ACT), requests a stay of the Commission's decision in this case, served June 11, 1979 (131 .C.C. 573), "insofar as the Commission purports to take action with less than a full complement of eleven Commissioners herein."[1]

Five of the six current Commissioners participated in the decision ACT seeks to stay. ACT essentially argues that the quorum necessary for the Commission to transact business is six of the possible 11 members of the agency. It therefore concludes that the Commission lacked jurisdiction to enter its June 11 decision. ACT also raises this argument in a separately filed petition to vacate. By decision entered July 3, 1979, however, the Commission found ACT's contentions without merit. It held that, in light of 49 U.S.C. 10301(e), four of the six current members constitutes a quorum, and thus the five Commissioners

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1. ACT apparently does not seek a stay with respect to the actual merits of the decision.

participating in the June 11 decision had jurisdiction to act.[2]

ACT contends that a stay would maintain the "status quo" until a court has had the opportunity to review the "fundamental" issue of whether the Commission has the ability to function at a reduced level of membership.[3] It argues that "[d]enial of a stay would result in the immediate implementation of a new policy with regard to a protestant's burden of proof in a motor carrier application, affecting many decisions." ACT further asserts in the most general of terms that it and its members could be subject to "incalculable" damage.

Under the standards set forth in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F. 2d 841, 844 (D.C. Cir. 1977), issuance of a stay is appropriate

> * * * when a serious legal question is presented, when little if any harm will befall other interested persons

---

2. ACT cites no authority for the belief expressed in its request for stay that the Commission has no power to rule on its own lawful composition. On the contrary, the agency clearly has the right to make this kind of jurisdictional determination and interpretation of its statute in the first instance. See *Federal Trade Commission* v. *Flotill Products, Inc.*, 389 U.S. 179, 181 n.2 (1967). Cf. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-38 (1952).

3. ACT is challenging the Commission's authority to function in *Assure Competitive Transportation* v. *Interstate Commerce Commission, et al.*, N. D. Ill., Civil Action No. 79C-487. The Commission has moved to dismiss the complaint on the bases that the court lacks jurisdiction, ACT does not have standing, and the complaint fails to state a claim upon which relief can be granted.

> or the public and when denial of the order would inflict irreparable injury on the movant.

ACT has failed to show that any of these factors is present here.

First, as the Commission explained in its decision of July 3, 1979, a quorum clearly existed when it finally disposed of Liberty's request for operating authority. The plain language of 49 U.S.C. 10301(e) — that vacancies in the Commission's membership shall not impair the agency's ability to exercise all of the powers Congress delegated to it — forecloses ACT's argument that "a serious legal question" exists as to the Commission's jurisdiction and composition.

Second, although ACT tries to limit its stay request solely to the quorum issue, such a stay would necessarily postpone the effective date of the final decision itself. This, in turn, would delay the issuance of a certificate to Liberty authorizing the operations for which the Commission has found a public need. Liberty filed its application in October, 1974. To hold up issuance of its certificate further would result in unwarranted harm to the shipping public that supports Liberty's request for authority.

Finally, ACT makes only generalized allegations of harm that would result if the Commission does not stay the June 11 decision. Such speculative assertions fall far sort of a showing of likely irreparable harm. Moreover, ACT bases these allegations on the notion that the *Liberty* decision represents a "new policy" with regard to a protestant's burden of proof in motor carrier application cases. The decision itself, however, refutes this. The Commission emphasized (131 M.C.C. at 574): "To argue that we somehow altered or 'reversed' a protestant's burden of proof misreads our prior decision, as well as much Commission

and court precedent." Indeed, the primary purpose of the last decision was to clarify that the traditional "*Pan-American*" criteria were the "cornerstones" of the agency's earlier decision (130 M.C.C. 243) granting Liberty's application.

It is ordered:

ACT's petition for stay is denied.

By the Commission, Chairman O'Neal.

H. G. HOMME, JR.,
Secretary.

(SEAL)

G1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

ASSURE COMPETITIVE TRANSPORTATION, INC.,
10South LaSalle Street
Suite #1600
Chicago, Illinois 60603,

Plaintiff,

v.

THE INTERSTATE COMMERCE COMMISSION,
12th & Constitution, N.W.
Washington, D.C. 20423

A. DANIEL O'NEAL,
Chairman
Interstate Commerce Commission
12th & Constitution, Northwest
Washington, D.C. 20423

and

VIRGINIA MAE BROWN,
CHARLES L. CLAPP.
BETTY JO CHRISTIAN,
ROBERT C. GRESHAM,
GEORGE M. STAFFORD,
Individually and as
Commissioners,
Interstate Commerce Commission
12th & Constitution, N.W.
Washington, D.C. 20423,

Defendants.

RECEIVED
FEB. 7 – 1979

H. Stuart
Cunningham, Clerk
United States
District Court

Civil Action No.
79C 487

Judge Marshall

COMPLAINT

FOR DECLARATORY AND INJUNCTIVE RELIEF FROM VIOLATION OF PLAINTIFF'S RIGHT TO DUE PROCESS OF LAW

PRELIMINARY STATEMENT

1. Plaintiff, Assure Competitive Transportation, Inc., (hereinafter "ACT"), is a non-profit corporation organized, existing, and doing business under the laws of the State of Illinois, having its principal place of business at 10 South LaSalle Street, Suite #1600, Chicago, Illinois 60603. ACT was formed in November, 1978 and is composed of over 3,000 members with a common purpose of insuring that the Interstate Commerce Commission acts in accord with law and to assure that the public interest in adequate, efficient, and economical motor carrier transportation is protected. Its membership is widely dispersed geographically and its members represent manufacturers, shippers and receivers, distributors, freight forwarders, motor carriers, financial institutions, insurance companies, drivers, attorneys, practitioners, consumers, owner-operators, and other segments from the public and private sector with an interest in preserving the regulatory framework.

In order to insure Due Process of Law for Plaintiff's motor carrier members operating under pertinent federal regulation of the motor carrier industry, Plaintiff brings this action to secure declaration that the Interstate Commerce Commission is illegally constituted and to enjoin said Interstate Commerce Commission from the transaction of further business until such time as it is constituted in accordance with law. Plaintiff and its motor carrier members have filed several pleadings before the Interstate Commerce Commission for adjudication, but now believe that the actions heretofore taken by the Commission are without force and effect. Plaintiff further seeks to enjoin the Commission from taking any further action until it is organized in accordance with law.

JURISDICTION AND VENUE

2. The jurisdiction of the Court is involked under Title 28 U.S.C. Section 1337 in that the matter involves an Act of Congress regulating commerce, Section 2201 and Section 2202 in that Plaintiff requests a declaratory judgment as to its rights and other necessary or proper relief, and Title 49 U.S.C. Section 10301, as hereinafter and more fully appears, and which provides in pertinent part:

> "The Commission is composed of eleven members appointed by the President by and with the advice of the Senate."

Prior to recodification becoming effective October 17, 1978, Title 49 U.S.C. former Section 11 read:

> ". . . which shall be composed of eleven Commissioners . . .";

and, Section 1891(e) in that each Defendant is an officer or employee of the United States and an agency thereof acting in his official capacity or under color of legal authority and the action is brought in the District where a real party involved in the action is situated.

PARTIES

3. Plaintiff, is a non-profit organization comprised, in substantial part, of members which are regulated motor carriers operating within the purview of the Interstate Commerce Act and other interested members of the public. Plaintiff and its members have been irreparably harmed by the illegal constitution of the Interstate Commerce Commission and the actions taken by that body since June 30, 1978 in attempting to effect the deregulation of the motor carrier industry by administrative *fiat* without prior study and consideration of the impact of their actions upon the motor carrier industry and without prior Congressional approval.

4. Defendant, Interstate Commerce Commission, is an independent regulatory agency of the United States of America, created by the Act to Regulate Commerce (approved February 4, 1887, 24 Stat. 379) as amended 49 U.S.C. 10101 *et seq.* having its principal office within the District of Columbia. The individual Defendants are the Chairman, A. Daniel O'Neal, and members of the Commission, Charles L. Clapp, Betty Jo Christian, Robert C. Gresham, and George M. Stafford, appointed by the President of the United States, and Virginia Mae Brown, an appointed member serving under an expired term.

FACTUAL BACKGROUND

5. The provisions of the Interstate Commerce Act effective prior to recodification at 49 U/S.C. Section 11 read as follows:

> "A commisson is created and established to be known as the Interstate Commerce Commission, which shall be composed of eleven Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate."

Upon recodification, the language was altered at 49 U.S.C. Section 10301(b) as follows:

> "The Commission is composed of eleven members appointed by the President, by and with the advice and consent of the Senate."

6. The provisions of the Interstate Commerce Act at 49 U.S.C. Section 10306(a) read as follows:

> "A *majority* of the Interstate Commerce Commission . . . is a quorum for the transaction of business" (emphasis supplied).

7. On or about January 30, 1976, Kenneth H. Tuggle retired as a member, leaving the Commission composed of 10 members. No Presidential appointment was made.

8. On or about September 15, 1976, Robert J. Corber resigned as a member, leaving the Commission composed of nine members. No Presidential appointment was made.

9. On August 31, 1978, Dale W. Hardin resigned as a member leaving the Commisson composed of eight members. No Presidential appointment was made.

10. On November 10, 1977, Alfred T. McFarland resigned as a member leaving the Commission composed of seven members. No Presidential appointment was made.

11. On December 31, 1977, the seven year term of Virginia Mae Brown expired, leaving the Commission composed of six members. No Presidential appointment nor re-appointment was made in the almost fourteen months since the expiration of her term.

12. On or about June 30, 1978, Rupert L. Murphy resigned as a member leaving the Commission composed of five members. No Presidential appointment was made.

13. On April 26, 1978, Chairman A. Daniel O'Neal, in a prepared statement delivered before the Senate Committee on appropriations, Subcommittee on Transportation, praised the President for refraining from making any Presidential appointments and stated:

> "The ability to control policy formulation has been aided by the reduction through attrition in the size of the Commission from 11 to seven members. The ability of the Commissioners acting in concert to unify and coordinate its policy-making function is facilitated by this smaller number, and I applaud the President from 'filling the vacant positions.' "

14. That, at all times since taking his oath of office, up to and including the present, the President has failed to present the name or names of a person or persons for his appointment to serve as a member by and with the advice and consent of the Senate.

PRAYER

WHEREFORE, Plaintiff, Assure Competitive Transportation, Inc., prays for the following equitable relief:

15. That pursuant to 28 U.S.C. Section 2201, this Court declare that Defendants' actions since June 30, 1978, have been conducted unlawfully and contrary to 49 U.S.C. Section 10306(a) for lack of a duly constituted majority, and, therefore, for lack of a quorum are null and void.

16. That pursuant to 28 U.S.C. Section 2201, this Court declare that the Commission, as presently composed, is improperly and illegally constituted.

17. That pursuant to 5 U.S.C. 703 and 28 U.S.C. Section 2202, this Court permanently enjoin the Commission and its individual Members from any further action of whatever nature until such time as there is a quorum appointed to transact business in accordance with law.

18. That pursuant to 28 U.S.C. Section 2201, this Court declare that the Defendants, by transacting business with an illegally constituted Commission, have denied and continue to deny the Plaintiff due process under Amendment V to the Constitution.

20. That this Court grant the Plaintiff such other and further equitable relief as the Court may deem just and proper.

Respectfully submitted,

PAUL NOLAND,
Attorney for Plaintiff.

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FILED
DEC 31 1980

No. 80-720

In the Supreme Court of the United States

OCTOBER TERM, 1980

ASSURE COMPETITIVE TRANSPORTATION, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
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ASSURE COMPETITIVE TRANSPORTATION, INC.,
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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, which by statute retains all its powers despite vacancies in its membership, is lawfully constituted when the President has not filled five vacancies.

2. Whether a quorum of the Commission is a majority of the Commissioners in office.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 629 F.2d 467. Two of the opinions of the Interstate Commerce Commission (Pet. App. C1-C15 and D1-D8) are reported at 130 M.C.C. 243 and 131 M.C.C. 573; two subsequent opinions of the Commission (Pet. App. E1-E2 and F1-F4) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1980. The petition for a writ of certiorari was filed on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves two separate challenges to the jurisdiction of the Interstate Commerce Commission. These challenges arose in a motor carrier licensing proceeding before the Commission and in a lawsuit commenced by petitioner in the United States District Court for the Northern District of Illinois.

1. The Liberty Trucking Company Case

In 1979, the Commission, by a four to one vote, affirmed a grant of additional authority to the Liberty Trucking Company, a motor common carrier (Pet. App. D1-D8). Petitioner, which had opposed the grant, requested the Commission to vacate its decision for lack of jurisdiction. Petitioner argued that, under 49 U.S.C. 10301(b), "the Commission is composed of 11 members" (Pet. App. E1), and that 49 U.S.C. 10306(a) defines a quorum as a ma-

jority of the Commission. Because only five members participated in the *Liberty* decision, petitioner claimed that the decision was void for lack of a quorum.

The Commission denied petitioner's request (Pet. App. E1-E2) in light of 49 U.S.C. 10301(e), which provides that a "vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all of the powers of the Commission." Noting that "[t]his provision * * * could not be clearer" (Pet. App. E1), the Commission concluded that a quorum consists of a majority of incumbent Commissioners (*id.* at E2).[1] Subsequently, petitioner sought judicial review of the Commission's decisions in the United States Court of Appeals for the Seventh Circuit.

2. The District Court Litigation

Prior to the Commission's decision in the *Liberty* application proceeding, petitioner filed a complaint in the United States District Court for the Northern District of Illinois (Pet. App. G1-G7), seeking a declaration that the Commission was illegally constituted and an order enjoining the Commission from acting "until such time as there is a quorum appointed" (*id.* at G6). Petitioner also requested the court to declare unlawful, for want of a quorum, all Commission actions taken since June 30, 1978 (*ibid.*).

The district court granted the Commission's motion to dismiss the complaint for lack of jurisdiction because exclusive review is vested in the courts of

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[1] Petitioner also moved the Commission to stay its decision "insofar as the Commission purports to take action with less than a full complement of eleven Commissioners" (Pet. App. F1). The Commission denied petitioner's motion for a stay (*id.* at F4).

appeals (Pet. App. B1-B3). The court additionally noted "[b]y way of dictum" that the Commission, with six members, was lawfully constituted to transact business notwithstanding the existence of vacancies in its membership (*id.* at B2). Petitioner appealed the district court's dismissal, and the court of appeals consolidated the appeal with petitioner's request for review of the Commission's decision in the *Liberty* case (*id.* at A5).

3. The Court of Appeals Proceeding

In the court of appeals, petitioner argued that a minimum of six Commissioners is necessary for a quorum and that the Commission was constitutionally barred from acting because Presidents Ford and Carter had illegally failed to fill existing vacancies, thereby permitting the Commission's membership to fall below eleven (Pet. App. A2-A3).

The court of appeals affirmed the decisions of the Commission and the district court (Pet. App. A1-A27). Specifically rejecting petitioner's contention concerning the absence of a quorum, the court agreed with the Commission's conclusion that the vacancy provision in 49 U.S.C. 10301(e) authorizes a majority of the Commissioners in office to exercise the full power of the Commission (Pet. App. A10-A15). With respect to petitioner's constitutional challenge to the Commission's jurisdiction, the court found that the only alleged illegality was on the part of the President, who was not a party to the lawsuit (*id.* at A16). Expressing no opinion as to whether the President's failure to appoint Commissioners was itself unlawful or actionable (*id.* at A18), the court "concluded that the Commission's actions are not invalid on the basis of too few Commissioners and will not be invalid so long as the existing Commissioners have been validly appointed * * *" (*id.* at A17).

ARGUMENT

This case presents no conflict among the circuits or any legal issue of general importance. Two circuits have now rejected the claim that the Commission is powerless to act with fewer than six participating Commissioners.[2] Those decisions are correct, and further review is unwarranted.

1. Petitioner's principal contention (Pet. 9-14) is that the court of appeals erred by not deciding whether the President acted unlawfully in failing to appoint members to fill Commission vacancies.

Petitioner's argument is without merit. The court of appeals properly did not decide this question because its resolution was unnecessary for disposition of the issues petitioner had raised. Petitioner challenged the Commission's jurisdiction to act, asserting that the Commission lacked the eleven members specified by statute and that in a given instance it had proceeded without a quorum. The court of appeals rejected petitioner's jurisdictional challenge by holding that the Commission could function with fewer than eleven members and that a quorum was a majority of the Commissioners in office (Pet. App. A12). Because the President's failure to appoint additional

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[2] In a decision not cited by petitioner, the United States Court of Appeals for the Eighth Circuit has also rejected the argument that a majority of eleven Commissioners must participate if a Commission action is to be valid. In *Missouri Pacific R.R.* v. *United States*, 625 F.2d 178 (1980), a railroad challenged the Commission's denial, by a three to two vote, of an abandonment application. The railroad argued that the denial was invalid because the five Commissioners who voted did not constitute a quorum. The court of appeals summarily rejected the railroad's argument, stating that "[w]e have also reviewed the procedural errors alleged by MoPac, and find them to be without merit" (*id.* at 183).

Commissioners, even if unlawful, would not have deprived the Commission of jurisdiction to act in particular cases, the court of appeals correctly found it unnecessary to decide whether the President had acted illegally (*id.* at A17-A18).

2. Petitioner further contends (Pet. 14-19) that the court of appeals misconstrued the Commission's statutory quorum provision on the grounds that the court did not apply the common law, that some courts have different quorum requirements, and that statutes specifying quorums for other agencies specifically define a quorum to be a majority of the agency members in office. This contention is unfounded.

Because the Commission was created by statutory enactment, its composition and authority are matters controlled by statute and not by the common law. Thus, to determine whether the Commission could lawfully act with fewer than eleven members, the court of appeals properly turned to the two statutory provisions specifically governing vacancies and quorums.

Petitioner does not, and reasonably could not, dispute the court's essential conclusion that the vacancy provision in 49 U.S.C. 10301(e) shows that "Congress intended those Commissioners in office, however many there are, to be 'the Commission' for all purposes" (Pet. App. A12). Because the vacancy provision directs that "the Commission" is composed of the members in office, the court of appeals correctly concluded that a quorum, which is a majority of "the Interstate Commerce Commission," is a majority of the Commissioners in office. The court's conclusion is logical, comports with the legislative history (see Pet. App. A14-A15), and gives full effect to each of the relevant statutory provisions.

In contrast, petitioner's claim that fewer than six Commissioners cannot transact the Commission's business would read out of the statute the vacancy provision, which expressly provides that a "vacancy in the membership of the Commission does not impair the right of the remaining members to exercise all of the powers of the Commission" (49 U.S.C. 10301(e)). Petitioner cites no legislative history to support its interpretation of the statute, and its position is contrary to the "fundamental rule of statutory construction that legislative enactments be construed in a manner designed to give effect to all parts while avoiding a result contrary to the apparent intent of the Congress." *Certified Color Manufacturers Ass'n* v. *Mathews*, 543 F.2d 284, 296 (D.C. Cir. 1976). See also, *e.g.*, *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955).

The cases petitioner relies on (Pet. 16-18) do not support its assertion that a quorum is invariably a majority of the full complement of agency members. All of those cases involved factual circumstances very different from those presented here.[3] Nor is the court of appeals' decision undermined by statutes governing other agencies that specifically make a quorum a majority of those in office (Pet. 18). On

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[3] *Frischer & Co.* v. *Bakelite Corp.*, 39 F.2d 247 (C.C. P.A.), cert. denied, 282 U.S. 852 (1930), involved a challenge to an action by three members of a six-member commission. Because there were no vacancies on that commission, the court did not address or resolve the issue of how many members are necessary for a quorum when vacancies exist. 39 F.2d at 251, 254-256. *Johnson* v. *State ex rel. Brannon*, 1 Ga. 271 (1846), and *Paine* v. *Foster*, 9 Okla. 213, 53 P. 109 (1896), state the common law rule for quorums of courts and did not concern statutory requirements for administrative agencies.

the contrary, the court of appeals correctly found (Pet. App. A14) that the existence of such statutes refutes petitioner's argument that a quorum of less than half of the full number of Commissioners is an " 'absurdity' Congress would never permit."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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